

No. 11633

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*see vol. 2472*  
United States

Circuit Court of Appeals

For the Ninth Circuit

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BUTTE COPPER AND ZINC COMPANY, a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

JUL 13 1947

PAUL P. O'BRIEN



No. 11633

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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

EARLE N. GENZBERGER,

H. L. MAURY, and

A. G. SHONE,

All of Butte, Montana,

Attorneys for Appellee and Plaintiff.

J. T. FINLEN, JR.,

W. H. HOOVER,

R. H. GLOVER,

JOHN V. DWYER, and

SAM STEPHENSON, JR.,

All of Butte, Montana,

Attorneys for Appellant and Defendant.

In the District Court of the United States in and  
for the District of Montana

No. 176

MRS. NELLIE ALLEN POAGUE, formerly NEL-  
LIE ALLEN, also named ELLA ALLEN  
POAGUE,

Plaintiff,

vs.

BUTTER COPPER AND ZINC COMPANY, a  
Corporation,

Defendant.

### AMENDED COMPLAINT

For an amended complaint, filed by leave of the  
Court, the plaintiff complains and alleges:

1.

That at all times hereinafter mentioned, the plain-  
tiff has been, and now is, a citizen of the State of  
Montana, residing at Butte therein. That the amount  
involved in this action at law, exclusive of interest  
and costs, is in excess of the sum of Three Thousand  
(\$3,000.00) Dollars, to-wit: The sum of Seven  
Thousand (\$7,000.00) Dollars.

2.

That at all times hereinafter mentioned, Butte  
Copper and Zinc Company was, and now is, a cor-

poration, organized and existing under and by virtue of the laws of the State of Maine, a citizen of the State of Maine, but at all such times doing business in Silver Bow County, Montana.

## 3.

That at all times since the 8th day of December, 1910, the plaintiff has been the owner of all of Lot number Four (4), and the North Ten (10) feet of Lot number Five (5), in Block number Sixty-seven (67) of the Original Townsite of Butte, Montana, according to the official plat and survey thereof originally filed with the County Clerk and Recorder of Deer Lodge County, Montana, later transcribed into the records of Silver Bow County, Montana, wherein the said property has been situated since the organization of said Silver Bow County.

## 4.

That since the said 8th day of December, 1910, at all times, the plaintiff has owned and maintained upon said Lot Four, and the North Ten Feet of Lot Five, a one-story brick veneer dwelling, consisting of six rooms, bath and central hall, with a frame addition in the rear, with a cellar with concrete floor, and side walls lined. Also a two-story, solid brick building 20 x 20 feet, and 17 feet high, with concrete foundation, at the rear of the lot; that the value of said buildings and the land, but for the acts of the defendant hereinafter alleged, would be the sum of Seven Thousand, Five Hundred (\$7,500.00) Dollars.

## 5.

That for a continuous period of time since July 19, 1917, the defendant, by itself, and by and through its agent, servant or partner, the Anaconda Copper Mining Company, has, by underground mining in the Emma, the Czarromah, the Nellie Quartz Lode Mining Claims, wrongfully destroyed and impaired the subjacent and lateral support of the plaintiff's said described lands, and both of the buildings thereon; that by reason of such mining, the defendant has caused cracks and leanings of all of the inside, and of all of the outside walls of both of said buildings; has caused the floors of both of said buildings to slope as much as six inches in the width of the front building, that building being the larger of the two buildings; has caused the walls and partitions of the said front building to lean as much as two inches; has caused the doors in said front building to bind; has caused major step cracks, vertical and horizontal, on the outside of the brick-work of the walls of the said front building; has caused both of said buildings to be a menace to life and limb of occupants, so that the same should, for the safety of the public, be razed, and the ground re-filled, which said razing of the buildings, and filling of the excavation, would cost the reasonable sum of Six Hundred (\$600.00) Dollars; that the defendant has thereby caused, since December 22, 1944, the plaintiff to expend for plumbing repairs to water pipes damaged by the defendant, Three Hundred, Sixty-one and 50/100 (\$361.50) Dollars, which was necessary and reasonable; the plaintiff

has been specially damaged by the defendant in such sums of Three Hundred, Sixty-one and 50/100 (\$361.50) Dollars, plumbing repairs, and Six Hundred (\$600.00) Dollars, necessary expense to raze said buildings, and fill excavation, to protect from injury pedestrians on the sidewalks in front of the same.

## 6.

That the said property of the plaintiff, before the injuries complained of, did have, and would now have, but for said injuries, a value of Seven Thousand, Five Hundred (\$7,500.00) Dollars; that because of said injuries done by the defendant to the plaintiff's property, the said property has no greater value than Five Hundred (\$500.00) Dollars.

## 7.

That at all times since July 19, 1917, the defendant, by certain partnership agreement, working contract, or lease, between defendant and Anaconda Copper Mining Company, the exact terms of said lease being unknown to the plaintiff, worked and operated the Emma, the Czarromah, the Nellie, the Welcome Stranger, and other quartz lode mining claims. The plaintiff alleges that the contract between the defendant and said Anaconda Copper Mining Company did not contain any provision whatever for the protection of plaintiff's property by the Anaconda Copper Mining Company, and that such work of the Anaconda Copper Mining Company, lessee, and the defendant caused the injuries hereinbefore set out to plaintiff's property; that no

part of the said sum of Seven Thousand (\$7,000.00) Dollars has been paid, and that defendant has damaged the plaintiff in such sum by reason of some, or all, of the acts above set out.

That said loss and damage to plaintiff having completely accrued, the plaintiff asks for interest from the date of filing this complaint, until paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of Seven Thousand (\$7,000.00) Dollars, and for interest, and for her costs of suit.

EARLE N. GENZBERGER,  
H. L. MAURY,  
A. G. SHONE,

Attorneys for Plaintiff.

Drawn by:

H. L. MAURY.

Service of the foregoing amended complaint is hereby acknowledged, and copy thereof received this 1st day of April, 1946.

W. H. HOOVER,  
R. C. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR.,  
SAM STEPHENSON, JR.

[Endorsed]: Filed April 1, 1946.

[Title of District Court and Cause.]

## ANSWER

Comes now the above named defendant, Butte Copper and Zinc Company, a corporation, and for its answer to the amended complaint of the above named plaintiff, heretofore filed herein, answers as follows:

### First Defense

#### I.

Complaint fails to state a claim against this answering defendant upon which relief can be granted.

### Second Defense

#### I.

Denies any knowledge or information thereof sufficient to form a belief as to any or all of the allegations contained in paragraph numbered 1 of said complaint.

#### II.

Answering the allegations contained in paragraph numbered 2 of said complaint, admits that at all times herein mentioned defendant, Butte Copper and Zinc Company, has been and now is a corporation organized under the laws of the State of Maine and that such defendant is a citizen of the State of Maine.

Denies each and every allegation, each and every part and the whole thereof contained in said paragraph numbered 2 not hereinbefore specifically admitted or denied.

#### III.

Denies any knowledge or information thereof sufficient to form a belief as to any or all of the allega-

tions contained in paragraph numbered 3 of said complaint.

#### IV.

Denies any knowledge or information thereof sufficient to form a belief as to whether or not since the 8th day of December, 1910, or at any time, or at all, plaintiff has owned or maintained upon said Lot 4 and the North 10 feet of Lot 5 a one-story brick veneer dwelling, or any building, consisting of 6 rooms, bath and central hall, with frame addition in the rear, with or without a cellar with concrete floors and side walls lined, or a two-story solid brick or other building 20 x 20 feet, 17 feet high, or of any other dimensions, with or without concrete foundation, at the rear of the lot or at any other place, or whether any building or buildings were situated entirely, or at all, on Lot No. 4 and the North 10 feet of Lot No. 5 in Block No. 67 of the Original Townsite of the City of Butte, Montana.

Denies each and every other allegation, each and every part and the whole thereof contained in paragraph numbered 4.

#### V.

Denies each and every allegation, each and every part and the whole thereof contained in paragraph numbered 5 of said complaint.

#### VI.

Denies that the injuries complained of, or any injuries, were caused by defendant.

Denies each and every other allegation, each and every part and the whole thereof contained in paragraph numbered 6 of said complaint.

## VII.

Answering the allegations contained in paragraph numbered 7 of said complaint, denies that any act or thing done by this answering defendant has caused any injury to any property, building or buildings of said plaintiff in the sum of Seven Thousand Dollars (\$7,000.00), or in any other sum or amount, or at all; admits that no part of the sum of Seven Thousand Dollars (\$7,000.00) has been paid.

Denies each and every allegation, each and every part and the whole thereof contained in said paragraph numbered 7 not hereinbefore specifically admitted or denied.

## VIII.

Denies each and every allegation, each and every part and the whole thereof contained in said complaint not hereinbefore specifically admitted or denied.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by virtue of her complaint and that defendant have judgment against said plaintiff for its costs of suit herein.

## Demand of Trial by Jury

Trial by jury is demanded in the above entitled cause.

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR.,  
SAM STEPHENSON, JR.,

Attorneys for Defendant,

Butte Copper and Zinc Company.

Address: 616 Hennessy Building, Butte, Montana.

Service of the above and foregoing Answer of Defendant, Butte Copper and Zinc Company, a corporation, acknowledged and copy thereof received this 20th day of April, 1946.

EARLE N. GENZBERGER,  
H. L. MAURY,  
A. G. SHONE,  
Attorneys for Plaintiff.

[Endorsed]: Filed April 20, 1946.

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[Title of District Court and Cause.]

**MINUTE ENTRY OVERRULING FIRST  
DEFENSE CONTAINED IN ANSWER**

This cause was duly called for hearing this day on the first defense contained in the answer herein, Mr. H. L. Maury being present and appearing for the plaintiff, and Mr. James T. Finlen, Jr., being present and appearing for the defendant.

Thereupon said first defense contained in the answer was submitted to the Court without argument and by the Court overruled. The defendant was thereupon granted an exception to the Court's ruling.

Entered in open Court at Butte, Montana, May 8, 1946.

H. H. WALKER,  
Clerk.

[Title of District Court and Cause.]

MINUTE ENTRY DENYING DEFENDANT'S  
MOTION FOR DIRECTED VERDICT

Thereupon the jury was duly admonished by the Court and retired from the courtroom, whereupon defendant moved the Court to direct the jury to return a verdict herein in favor of defendant and against the plaintiff for lack of proof, the reasons being stated into the record. Thereupon, after due consideration, Court ordered that the motion be and is denied, to which ruling of the Court the defendant excepted and exception duly noted.

Entered in open Court at Butte, Montana, April 3, 1947.

H. H. WALKER,  
Clerk.

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[Title of District Court and Cause.]

VERDICT

"We the jury in the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff's damages in the sum of Fifty-Five Hundred and no/100 (\$5500.00) Dollars, with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946.

HARRY HIGH,  
Foreman.

[Endorsed]: Filed April 7, 1947.

[Title of District Court and Cause.]

**JUDGMENT**

This cause having been brought regularly on for trial before the above-entitled Court, the Honorable R. Lewis Brown presiding, with a jury duly impaneled and sworn, on March 31, 1947, plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, being present in person, and plaintiff being represented by counsel, H. L. Maury and Earle N. Genzberger, and the defendant being represented by counsel John V. Dwyer, James T. Finlen, Jr., and Sam Stephenson, Jr., and the trial having been continued from day to day, testimony on the part of plaintiff and defendant was concluded, and arguments of respective counsel having been made, said jury was duly instructed by the Court and having retired for deliberation did thereafter and on April 7, 1947, return into the Court with the following verdict:

(Title of Court and Cause.)

**VERDICT**

“We, the jury in the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff’s damages in the sum of Fifty-Five Hundred and no/100

(\$5500.00) Dollars, with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946.

HARRY HIGH,  
Foreman.

Wherefore, by reason of the law and the premises, and in accordance with said verdict, it is ordered, adjudged and decreed, and this does order, adjudge and decree that the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, do have and recover from the defendant, Butte Copper & Zinc Co., a corporation, the sum of Fifty-five Hundred and no/100 (\$5500.00) Dollars, together with interest thereon at the rate of six per cent per annum (6%) from February 2, 1946, amounting to date to the sum of Three Hundred Eighty-nine and 58/100 (\$389.58) Dollars, a total of principal and interest of Fifty-eight hundred eighty-nine and 58/100 (\$5889.58) Dollars, together with her costs in this action expended, hereby taxed in the sum of \$109.86.

Done in open Court this 8th day of April, 1947.

R. LEWIS BROWN,  
Judge.

[Endorsed]: Filed April 8, 1947.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To: Mrs. Nellie Allen Poague, formerly Nellie Allen, and to H. L. Maury, Earle N. Genzberger and A. G. Shone, her attorneys:

You and Each of You are hereby notified that Butte Copper & Zinc Company, a corporation, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 8th day of April, 1947.

Dated this 16th day of April, 1947.

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR.,  
SAM STEPHENSON, JR.,  
Attorneys for Defendant.

[Endorsed]: Filed April 16, 1947.

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[Title of District Court and Cause.]

**ORDER FOR TRANSMISSION OF ORIGINAL  
EXHIBITS**

Upon application of counsel for Butte Copper and Zinc Company, a corporation, applicant herein, and it appearing that plaintiff's Exhibits 1, 8-a, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20-a, 20-b, 21, 22, 23, 24, 25, 26 and 27 and defendant's Exhibits 4 and 28 received in the trial of this cause should, by reason of their contents, be sent to the appellate court under Rule 75, Section i of the Rules of Civil Procedure.

It Is Hereby Ordered that all such original exhibits be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for

the Ninth Circuit and transmitted to the Clerk of said Court by mail with the record on appeal in said cause, said exhibits to be returned to the Clerk of this Court after the final disposition of said appeal, according to the practice of said Clerk of said Circuit Court of Appeals.

Dated this 2nd day of May, 1947.

R. LEWIS BROWN,  
Judge.

[Endorsed]: Filed May 2, 1947.

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[Title of District Court and Cause.]

### ORDER

It appearing to the Court that heretofore and on May 2, 1947, the Court made an order directing that Exhibits 8-A, 9, 10, and 11 be sent to the Circuit Court of Appeals of the Ninth Circuit as original exhibits;

It further appearing to the Court that each of the exhibits is a writing, that there is nothing about the original exhibits that require inspection by the Circuit Court of Appeals, that they have all been incorporated in the transcript on appeal herein, and that the order of this court of date May 2, 1947, directing that said exhibits be transmitted to the Clerk of the Circuit Court of Appeals in their original form was made through inadvertence and mistake;

It Is Therefore Ordered and this does order that

the said order of the Court of May 2, 1947, concerning said exhibits, be and the same hereby is set aside and the Clerk of this court is directed to retain in his custody the said original exhibits and all of them and not to certify them to the Clerk of the Circuit Court of Appeals of the Ninth Circuit.

Done and dated this 13th day of May, 1947.

R. LEWIS BROWN,  
United States District Judge.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellant, Butte Copper and Zinc Company, a corporation, defendant above named, hereby and herewith designates the contents of the record on appeal in the above entitled matter as follows:

1. Names and addresses of attorneys of record.
2. Plaintiff's Amended Complaint.
3. Answer of Butter Copper and Zinc Company, defendant.
4. Minute Entry denying and overruling the First Defense in defendant's Answer.
5. Reporter's Transcript of testimony.
6. That portion of the Minute Entry dated April 3, 1947, contained in Paragraph 7 thereof, setting forth the Order denying defendant's motion for a directed verdict.
7. Verdict.

8. Judgment.
9. Notice of Appeal.
10. Order for Transmission of Original Exhibits.
11. Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely.
12. Certificate of Clerk of Court.
13. Statement of Points Upon Which Defendant Intends to Rely and Designation of Portions of the Record to be Printed Under Rule 19 (C.C.A.).

Filed herewith are two (2) copies of the Reporter's Transcript of the testimony taken in the trial of this case.

#### STATEMENT OF POINTS UPON WHICH DEFENDANT INTENDS TO RELY ON APPEAL

##### I.

The Court committed error in refusing to grant defendant-appellant's motion for a directed verdict because:

1. There was and is no evidence to support a verdict in favor of plaintiff and against the defendant.
2. There was and is no evidence to support a judgment in favor of plaintiff and against defendant.
3. There was and is no evidence that defendant performed any act or acts that could or did cause any damage to plaintiff's property.

4. The evidence was and is conclusive that defendant did not perform any act or acts that could or did cause and damage to plaintiff's property.

5. There was and is no evidence that defendant performed any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff's property.

6. The evidence was and is conclusive that the defendant did not perform any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff's property.

7. The evidence was and is conclusive that defendant was a Lessor of the property in which the mining alleged to have damaged the property of the plaintiff was performed; and that any mining performed was performed by a Lessee, and was not under the control or supervision of defendant.

## II.

That the Court committed error in giving plaintiff's Instruction numbered 2 for each of the reasons set forth in Paragraph I above.

## III.

That the Court committed error in giving plaintiff's Instruction numbered 3 for each of the reasons set forth in Paragraph I above.

## IV.

That the Court committed error in giving plaintiff's Instruction numbered 5 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

V.

That the Court committed error in giving plaintiff's Instruction numbered 9 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

VI.

That the Court committed error in giving plaintiff's Instruction numbered 11 because:

1. Of each of the reasons set forth in Paragraph I above.

2. Said Instruction permitted the jury to find that defendant mined beneath the surface of plaintiff's property and damaged the same, when the evidence was and is conclusive

and uncontradicted that the defendant did no mining, either by itself or through an agent, servant or partner.

### VII.

That the Court committed error in refusing to give defendant's Instruction numbered 1 for each of the reasons set forth in Paragraph I above.

### VIII.

That the Court committed error in refusing to give defendant's Instruction numbered 12 for each of the reasons set forth in Paragraph I above.

### IX.

That the Court committed error in refusing to give defendant's Instruction numbered 13 for each of the reasons set forth in Paragraph I above.

### X.

That the Court committed error in giving that portion of its charge to the jury set forth as follows:

"If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the

Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations."

for each of the reasons set forth in Paragraph I above.

## XI.

That the Court committed error in admitting the evidence of leaks, repairs or changes in gas mains or pipes and evidence of gas explosions over defendant's objections, and in refusing to grant defendant's motion to strike such evidence because:

1. There was and is no evidence that proved or tended to prove that said leaks, repairs or changes or gas explosions were due to or caused by any act or acts of defendant, its agent, servant or partner.
2. There was and is no evidence tending to show or prove that any such leaks, repairs or changes in gas lines or pipes or gas explosions were competent, relevant or material, or that they tended to prove or disprove any issue in

this case or that plaintiff sustained any damages thereby.

3. No cause was ascribed for the leaks, repairs or changes or explosions and no evidence was or is given upon which a conclusion as to the causes of such leaks or explosions could properly be predicated, and that the jury was permitted to speculate as to the reasons for and causes of said leaks, repairs or changes in gas lines and pipes and the reasons for or causes of said gas explosions.

### XII.

That the Court committed error in refusing to give defendant's requested Instruction numbered 2 for each of the reasons set forth in Paragraph XI above.

### XIII.

That the Court committed error in refusing to give defendant's requested Instruction numbered 3 for each of the reasons set forth in Paragraph XI above.

### XVI.

That the Court committed error in refusing defendant's motion to strike the testimony of plaintiff Poague respecting leaks in the plumbing of her house and in refusing the grant defendant's requested Instruction numbered 14 because:

1. There was and is no evidence that said leaks were caused by ground movement due to mining.
2. There was and is no evidence tending to show or prove that facts regarding any such

Leaks were competent, relevant or material or that they tended to prove or disprove any issue in this case.

3. No cause was ascribed for the leaks and no evidence was or is given upon which a conclusion as to the cause of such leaks could be properly predicated.

### XV.

That the Court committed error in refusing to give defendant's requested Instruction numbered 15 because:

1. For each of the reasons set forth in Paragraph I above.
2. There was and is no evidence that the razing of the buildings was necessary.
3. The evidence conclusively shows that the razing of plaintiff's buildings was not necessary to protect pedestrians using the sidewalks as alleged in the complaint.
4. The allegation of the complaint that razing of the buildings was necessary to protect pedestrians on the sidewalks in front of said buildings and that the cost thereof was a necessary element of damages was wholly unsupported by the evidence and should not have been left for the consideration of the jury.

### XVI.

That the Court committed error in refusing to give defendant's requested Instruction numbered 16 because:

1. The law does not make a Lessor of min-

ing ground liable for damages because of failure to include a covenant or agreement in its lease to the effect that the Lessee will support the surface of the ground.

W. H. HOOVER,

R. H. GLOVER,

JOHN V. DWYER,

J. T. FINLEN, JR.,

SAM STEPHENSON, JR.,

Attorneys for Defendant,

Butte Copper and Zinc

Company, a Corporation.

Address: Hennessy Building,

Butte, Montana.

Service of the foregoing Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely on Appeal acknowledged, and copy thereof received this 2nd day of May, 1947.

EARLE N. GENSBURGER,

H. L. MAURY,

A. G. SHONE,

Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1947.

In the District Court of the United States, in and  
for the District of Montana, Butte Division

No. 176

MRS. NELLIE ALLEN-POAGUE, formerly  
NELLIE ALLEN,

Plaintiff,

vs.

BUTTE COPPER AND ZINC COMPANY, a  
corporation,

Defendant.

Appearances:

For Plaintiff: Earle N. Genzberger, H. L. Maury  
and A. G. Shone.

For Defendant: W. H. Hoover, R. H. Glover,  
John V. Dwyer, J. T. Finlen, Jr., and Sam Stephenson, Jr.

**BILL OF EXCEPTIONS**

Be It Remembered, That the above-entitled cause  
came on regularly for trial before the Honorable  
R. Lewis Brown, Judge of the District Court of the  
United States, in and for the District of Montana,  
Butte Division, sitting with a jury, on March 31st,  
April 1st, 2nd, 3rd and 7th, 1947, Messrs. H. L.  
Maury and Earle N. Genzberger appearing as attor-  
neys for the plaintiff, and Messrs. John V. Dwyer,  
James T. Finlen and Sam Stephenson, Jr., appear-  
ing as attorneys for the defendant.

Thereupon, the following proceedings were had, orders made, objections interposed, rulings made by the Court, and exceptions taken, and the proceedings, orders and exceptions hereinafter appearing had and taken thereon, the following being all of the testimony and evidence offered or introduced on the trial of this cause, to-wit: [27\*]

### MRS. NELLIE POAGUE

the plaintiff, called as a witness on her own behalf, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Genzberger:

Q. State your name to the court and jury, Mrs. Poague? A. Mrs. Nellie Poague.

Q. And what was your name before you became Mrs. Poague? A. Allen.

Q. Nellie Allen? A. Yes, sir.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Where do you live, Mrs. Poague?

A. At 415 South Dakota Street, Butte, Montana.

Q. And how long have you lived in Butte, Montana?

A. You mean how long have I lived in Butte, Montana?

Q. Yes.

A. Well, I been here over fifty years.

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\* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

(Testimony of Mrs. Nellie Poague.)

Q. And at 415 South Dakota Street for how long?

A. I have lived there for over thirty-five years.

Q. And are you the owner of the property known as Lot No. 4 and the north 10 feet of Lot No. 5 in Block 67 of the Original Townsite of Butte?

A. I am, and I bought it off of Mr. Andy J. Davis of the First National Bank; the old gentleman, not the young Mr. Andy.

Q. And that was in December, 1910?

A. Yes, sir. [28]

Mr. Genzberger: At this time we offer in evidence Plaintiff's Exhibit No. 1, a stipulation as to the ownership of the property of plaintiff.

The Court: Any objection?

Mr. Finlen: No objection.

The Court: It will be admitted without objection.

(Plaintiff's Exhibit No. 1, a Stipulation, was here received in evidence and is as follows:)

### PLAINTIFF'S EXHIBIT No. 1

[Title of Court and Cause.]

#### Stipulation

It Is Hereby Stipulated by and between the Plaintiff and the defendant, acting through their respective counsel, that at all times since

(Testimony of Mrs. Nellie Poague.)

the 13th day of December, 1910, the plaintiff has been, and now is the owner of, and in possession of all of Lot Four (4), and the North Ten (10) feet of Lot numbered Five (5), in Block numbered Sixty-seven (67) of the Original Townsite of Butte, Montana, according to the official plat and survey thereof as originally and officially filed in the office of the County Clerk and Recorder of Deer Lodge County, Montana; said plat and survey having been transcribed into the records of Silver Bow County, Montana; excepting and reserving, however, all of the ores and minerals beneath the surface of the above described premises, with the right to mine for, and extract the same, and that this stipulation may be introduced in evidence in any trial of the above entitled cause.

Dated this 25th day of March, 1947.

EARLE N. GENZBERGER,  
A. G. SHONE,  
H. L. MAURY,  
Attorneys for Plaintiff. [29]

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR.,  
SAM STEPHENSON, JR.,  
Attorneys for Defendant.

(Testimony of Mrs. Nellie Poague.)

Q. Showing you Plaintiff's Exhibit No. 2 for identification, Mrs. Poague, have you seen this document before? A. Yes, sir.

Q. Where did you get it?

A. From the First National Bank.

Q. Of this city? A. Of this city.

Q. And this is the deed you refer to from Andy Davis, Sr.? A. From Mr. Andy J. Davis.

Mr. Genzberger: We will offer in evidence Plaintiff's Exhibit No. 2 for identification.

Mr. Dwyer: To which the defendant objects on the grounds and for the reason that it has already been stipulated that the plaintiff is the owner of the property in question.

For the further reason that this deed contained a covenant of which the grantor was not in a position to give. If counsel wants to introduce the whole record then we will ask the severance deed and all others be introduced also. This is an attempt to introduce a covenant which is not in this case and for that reason we object to it.

The Court: Doesn't your stipulation cover the matter. Let me see your stipulation.

Mr. Maury: If that is counsel's idea of course we have [30] no purpose in putting the deed in.

Mr. Dwyer: If that deed goes in of course we would ask that the original deed severing the surface from the minerals be also put in evidence.

Mr. Genzberger: We have no objection to that.

Mr. Dwyer: This plaintiff has no greater title than her predecessor in interest had.

The Court: Well, it seems to me you gentlemen

(Testimony of Mrs. Nellie Poague.)

have stipulated and the stipulation covers it. In other words, it's agreed she is the owner of the property; that is, the surface but not the mineral rights. I think it's covered by the stipulation. The objection will be sustained.

Mr. Genzberger: We will ask for an exception.

Q. After taking possession of that house in 1910, Mrs. Poague, what did you do with it. What, if anything, did you do with the house after you first bought it?

A. Well, I fixed it up. It took me quite a while because I had no money and I was working for different gentlemen, Mr. George H. Casey for sixteen years; Mr. Jimmie King for twelve years; Mr. H. L. Frank for about ten years; Mr. Augustus Heinze, not steady; but off and on for about nine years, and Mr. Wilhelm. I worked for Mr. Jimmie Rowe sixteen years, done janitor work; and W. H. Orr and Mr. Cobban, I think that's the name, over here on Granite street; and W. H. Orr. And at one time I was working—you know it wasn't—it wasn't steady but that's how I paid for my home, was working.

Q. What was the nature of your duties?

Mr. Finlen: We ask that all of the answer following "I fixed it up but I had no money," be stricken as not [31] responsive.

The Court: Well, denied. It's harmless. Proceed.

Q. What did you pay for the house originally?

A. I paid \$3000.00.

Q. What was the nature of the house at the time you first bought it?

(Testimony of Mrs. Nellie Poague.)

A. My, it was awful. There was nothing there but the outside of the house made a splendid appearance, but outside of that the toilet was an out-toilet and there was even a well there when I bargained to buy the house.

Q. Then what did you do with it?

A. Well, when I got able I would talk to my bosses I was working for and things I wanted done like the water—— (interrupted).

Mr. Dwyer: We object to a rambling discussion about her bosses and who she worked for. It might be interesting.

Q. Just tell what you did?

A. And I worked a good many years and that's how I did; and the wiring of the house.

Q. State what you did?

The Court: What improvements did you make in the house. What did you put in there to improve the house?

A. I put in the water and bath and built on a bathroom and took another room and made it larger.

Q. (By Mr. Genzberger): Was there electricity in the house when you first bought it?

A. No, sir.

Q. Is there electricity there now?

A. Yes, there is electricity in it now. [32]

Q. Who put in the electricity?

A. Elderkin.

Q. I don't care about the contractor. Who paid for it? A. Me; me.

(Testimony of Mrs. Nellie Poague.)

Q. Do you know how much you paid to put electricity in there?

A. The first time the house was wired it cost \$125.00.

Q. Then with reference to the bathroom and the addition you built to the other room of the house. You built two rooms after you bought it?

A. No, I built one room but I,—well, I built the bathroom from the ground on up but the other room I just remodeled it and made another room smaller.

Q. You divided another room?

A. Yes, sir.

Q. And you put in partitions and plaster and papered?

A. Yes, sir, and had a cellar dug part way underneath the house.

Q. You dug the cellar?

A. Yes, sir, I paid for that.

Q. What did you do with the well?

A. Well, I had a couple of men, you know, from time to time to bring rocks from different buildings. They were white men working and when they would have any rocks I told them to come and put them and fill up this well, and when I could I filled this toilet up. I had it cleaned out by the night man and I had the well filled in and I was advised by people that knew more than I did.

Q. Don't tell what somebody told you? [33]

A. To put lime around and sand.

Q. Do you remember what you paid for that?

(Testimony of Mrs. Nellie Poague.)

A. Gentlemen of the jury, and ladies, I have no idea but I know it cost me enough.

Q. What else did you do to the outside of the place?

A. Well, I had the house painted twice and two shingle roofs put on it and then I had a finish put on; well, I call it a paper roof.

Q. A composition roof. Is that what you had?

A. Yes, sir; and built on two porches and they were both torn down, and just as true as I sit in this chair I know it was nothing that tore them down but that Emma mine. Then I put up another one about six years ago when the WPA was just starting. Of course I didn't make the money on the WPA but that's the time I had it put up. I can remember that.

Q. Was there a fence in front when you first bought it? A. There wasn't a fence no place.

Q. And who built the fence?

A. Well, I got different contractors.

Q. What person paid for the fence?

A. Me. I paid for everything.

Q. And describe the fence that is in front of the property now? A. Now?

Q. Yes.

A. It's an iron fence up on a concrete foundation—I guess that's what you call it—about, oh, I will say the foundation in some places is,—I know it is higher than that (indicating with hands). [34]

Q. Indicating eighteen or twenty inches?

(Testimony of Mrs. Nellie Poague.)

A. Yes, sir; you know (indicating with hands).

Q. We can't get that into the record.

The Court: You got into the record an estimate of eighteen or twenty inches.

Q. What kind of sidewalks were in front of the house when you first bought it?

Mr. Finlen: Objected to as without the issues of the case. No issue as to sidewalks.

The Court: Overruled. Answer the question.

Mr. Finlen: Exception.

(Question repeated.)

A. Boards.

Q. Now, what kind of a sidewalk is there now?

A. Concrete that I put up by—

Q. Who built that sidewalk. Who paid for it?

A. I paid for it and Mr. Sivalon put it down. I paid for it.

Q. What kind of streets have you on Dakota street with reference to the nature of the roadway?

A. Well, they were all right for a while until—

Q. I don't mean that. When you first took over the property was there a dirt street or paved roads?

A. Oh, they were dirt streets.

Q. What kind of a street is it now with reference to improvements?

Mr. Finlen: We object to that on the ground that it's incompetent, irrelevant and immaterial; not within the issues of the case. No claim for damages to the street.

The Court: That's true but then it goes to the

(Testimony of Mrs. Nellie Poague.)

description [35] of physical surroundings of the property. Overruled.

Q. You may answer?

A. Well, the street was in fair condition.

The Court: He means by that was the street paved afterwards?

A. No, sir, Judge, it was just oiled, I believe. I think that's oiled but it's all wore off now from the trucks from the mine going up and down.

Q. By Mr. Genzberger): Is Dakota street paved?

A. No, sir, it's dust there.

Q. Was it oiled?

A. It was oiled but it's all wore.

Q. Who paid for the oiling of Dakota street with reference to your property?

Mr. Finlen: We object to that on the ground that it's not within the issues of the case; incompetent, irrelevant and immaterial.

The Court: I will sustain that. If it's an effort to show she paid for the city streets.

Mr. Genzberger: Exception.

Q. With reference to the alley between Dakota and Montana streets, the alley in the rear of your house; what, if anything, was the condition of that alley when you first became acquainted with the property? A. Nothing but dirt.

Q. What is it now?

A. Well, what ain't tore up from the mine.

Q. Before we go into that, what is the material in the [36] alley now? A. Concrete.

(Testimony of Mrs. Nellie Poague.)

Q. When was the concrete pavement put in the alley? A. I don't know how long that's been.

Q. Who paid for it?

A. I paid my part.

Mr. Finlen: Objected to as not within the issues.

The Court: Sustained. The answer will be stricken and you ladies and gentlemen of the jury are admonished not to pay any attention to the answer just given by the witness to the question.

Mr. Genzberger: You Honor is ruling the cost of the improvements for paving the street and alley is not within the issue of the case?

The Court: Yes.

Mr. Genzberger: That's the ruling?

The Court: Yes.

Mr. Genzberger: Very well.

Q. Now, Mrs. Poague, what else did you do with that house with reference to improvements?

A. Well, I had it wired and new doors and new windows put in where they were all broken out, and bath fixtures and toilet and wash basin and sink in the kitchen; and the house shingled twice and then I built on a back porch.

Q. What, if anything, did you build on that lot at the rear portion adjoining the alley?

A. What did I build?

Q. What?

A. Did you say what did I build? A garage, \$2750.00.

Q. When was that done? [37]

A. That was done in 1925.

(Testimony of Mrs. Nellie Poague.)

Q. And how much did the garage cost?

A. It cost \$2750.00. The concrete basement where I kept coal and used for a storehouse that's what—(interrupted).

Q. Describe that garage, how was it constructed?

A. Well, there was two sets of doors for to come in on the alley and they were facing Montana street, the doors was; yes, that's right—(interrupted).

Q. What kind of a floor?

The Court: Wait a minute until she answers the question. Give her time to answer one question before you put another.

A. A concrete floor in the basement. That was concrete and above that where the cars came in on are, I forget now how many inches Mr. Goddard said the floor was. It was the best we could buy or get at that time.

Q. Of what material were those floors in the garage made?

The Court: She said concrete.

Q. I didn't get it. And what were the walls made of? A. Well, brick; brick walls.

Q. Before we leave the garage, how many cars could be stored in that garage? A. Two.

Q. And what did you do with the garage after you had it completed?

A. Well, I rented it out to different men and especially one man by the name of Healy and he paid me \$15 because he occupied both sides, and Mr. Goddard told me [38] how much to rent the garage out for. There wasn't no garages around in

(Testimony of Mrs. Nellie Poague.)

town much when I put that up in 1925, and people that bought cars they wanted a good garage; and then I heard some—— (interrupted).

Q. Let's go back to the house. How many rooms were in your house?

The Court: Just a minute. You said \$15. For what period of time was that; was that \$15 a month or a week? A. A month, Judge, your Honor.

Q. \$15 a month?

A. Yes, and for about six or seven months I got that much out. Well, am I permitted to tell how the man that rented the garage, how I came to get this money?

The Court: If you are to tell that your counsel will ask the questions.

Q. (By Mr. Genzberger): Did you always get \$15 a month? A. No, sir.

Q. How much did you get later?

A. Well, I got \$5.00.

Q. For what?

A. \$5.00 aside for the garage; I got \$6.00 a couple of times and then I cut it down to \$5.00.

Q. \$5.00 for each side? A. Yes, sir.

Q. \$12.00 a month? A. Yes, sir.

Q. And then \$10.00 a month? A. Yes, sir.

Q. Now, then, have you been able to rent that garage the past two years? [39]

A. Oh, no, sir.

Q. Why not?

A. Well, every time Mr. MacPherson would take his car in he couldn't get out and I would have to

(Testimony of Mrs. Nellie Poague.)

get a carpenter to work on the doors and that kept from, kept up for about six or seven months; and Mr. MacPherson is a mail clerk on the Great Falls run and it was just putting out three and four dollars and two and one and five and six and I was only getting five dollars out of it. Then I told him that I wouldn't pay no more, pay for no more repairing to the garage.

Q. What happened to the garage?

A. Well, the mine happened to it.

Q. What happened. Tell the jury what happened to it. They never seen it?

A. Well, the doors to both of the garages are sunk in like that (indicating) and then going out like they are going to fall in the alley when the bricks fall, and then when I told Mr. MacPherson that the Lloyd block was torn down it's right close to me.

Q. Before going into that, what did you observe with reference to the garage and particularly the cement part first? A. Well, the windows—

Q. What happened to the windows?

A. They couldn't get the windows open. You know when Mr. MacPherson couldn't get the windows open for, oh, quite a while and when he would be working on his car and doing anything he would have to leave the door open, and he didn't like to do that. [40]

Q. Go down below. What did you see happen to the concrete.

(Testimony of Mrs. Nellie Poague.)

A. It all cracked; it's all cracked, big cracks in it; big cracks—I guess you call it the north garage; the north side of the garage. The garage is sitting like this and the north side of the garage is all fallen in the basement and I had stored things in there and some was mine and some was other people's and I had to move out and I moved out just in time. It's all out; well, I guess you call it the north side, the upper side of the garage.

Q. What happened to the upper side of the garage with reference to falling in or out?

A. It's falling in the basement.

Q. When you said it you refer to the concrete or brick walls? A. The concrete.

Q. That's the concrete foundation?

A. Yes, sir; and the brick and the concrete foundation on the lower side of the garage. Well, the south side, I guess you call it, of the garage, it's all cracked, and the bricks—last Monday morning I know the bricks was cracked and last Monday morning when I went out to the ash can the bricks was all laying there, some on the south side in the yard and they were laying there. I was going to pick them up and I said, no, I am going to leave them there; I don't know what's going to happen and somebody might want to see them laying there, and I am sick anyhow and I just let them lay there.

Q. What else did you observe with reference to the [41] garage and concrete walls, particularly around the steps that lead into the lower portion of the garage?

(Testimony of Mrs. Nellie Poague.)

A. Well, as you go down the steps, why there is a wall and it's all cracked and the floors are cracked, all cracked. You can get your hand in there and the floor is all bulged up and the steps are in good condition; the steps, I think there are five of them—I know there is four—and they are all in first class condition, but the wall on the east side facing east is all cracked to pieces and it's fallen.

Q. When you speak of bulges in the floor do you mean the floor of the garage or the floor of the basement of the garage?

A. I mean the floor of the basement of the garage.

Q. Underneath the garage proper where you said there was room for two cars, how have you divided that basement of the garage?

A. Well, one I use for a coal house, the one on the north side; and on the south side I use for a storehouse and I was going to have that for a wash room but I never got around to do it. I had a chimney on the garage and it's all fell down.

Q. The chimney fell down?

A. Yes, sir; the chimney fell down.

Q. You had two rooms downstairs and room for two cars upstairs, is that right? A. Yes, sir.

Q. Going back to the house, Mrs. Poague, what did you observe first with reference to your house that was unusual? [42]

(Testimony of Mrs. Nellie Poague.)

A. Well, the doors; I was working and when I would go out I couldn't get in, and it wouldn't make any difference if I came home late at night I would have to go next door to my neighbor's and get them to come and help me to get in some way, and we would burst the window and catches on the windows and get in that way until I could get a key man down there to shore the doors off and get the doors fixed.

Q. What doors is this you are speaking of?

A. I am speaking of the front door, and its been chopped out and beat out so it's a disgrace.

Q. How many times have you had the front door fixed?

A. Well, gentlemen of the jury, and ladies, I don't know.

Q. More than one?

A. Oh, more than one; more than four or five times, and they were new doors and everything was in good condition. I got first class lumber or doors and windows whenever I would have to have anything done.

Q. After the man would fix the door the first time you could get in and out easily?

A. Yes, sir.

Q. And then what would happen?

A. I could get in and out for a while and then they would commence to sag down and the house would commence to sag down, and the front step there, and its all cracked right along there as you come in the front door; and by the front bathroom

(Testimony of Mrs. Nellie Poague.)

window by the porch its all cracked and the porch is gone down; I know, I know over two feet and its gone clear on down into the ground and I [43] put what I call a runner which you put on after you put your boards on. That's what I call it.

Q. What if anything did you observe on the windows?

A. Well, the glass on the windows is all leaving the windows from the top and the side, and in the front bedroom in the corner of one of the windows its cracked and I put a piece of tin in to hold it. It's cracked quite a bit; it's cracked like that and I believe I put a piece of tin in to hold it.

Q. Mrs. Poague did you notice anything with reference to the northeast corner of your building near the front windows. That's on the upper Dakota street side? A. Yes, sir.

Q. Tell the court and jury what appears in the outside there?

A. You mean on the outside or inside?

Q. The outside first?

A. Well the bricks is, oh, it seemed like to me they have fallen to pieces and my house is leaning over on 413's house. That's right next to me, a two-story brick building, and the walls is going together.

Q. What did you find inside of where you found the cracks on the outside; what happened on the inside?

A. It's all bulged like that in the front room and in the dining room.

(Testimony of Mrs. Nellie Poague.)

Q. Before we leave the front room, what do you find on the inside of the front room?

A. The plaster is all zig-zaggy.

Q. Zig-zaggy. You mean cracked in a zig-zag form?

A. Yes, sir; and its bulging out and the plaster is falling from underneath, kind of leaving the lathes I [44] guess you call it.

Q. What happened to the paper you put in the front room? A. The paper?

Q. Yes?

A. Well, oh, it's all zig-zaggy. A couple or three years ago I had it all papered and its in a bad condition now from where the paper is all zig-zagging.

Q. What do you mean by bad condition?

A. I mean the paper is leaving the wall.

Q. What's under the paper as far as you can see. What has happened to the plaster?

A. I guess the plaster is what's causing the paper to bulge like it does.

Q. Can you see anything?

A. No, I can't see anything but the wall is, especially where the bay windows are they, oh, I just can't explain it like it should be, but it's there to be seen.

Q. Is there a crack across the arch of the bay window in the ceiling?

Mr. Finlen: Objected to as leading and suggestive.

The Court: Overruled. Answer the question.

A. What is the question?

(Testimony of Mrs. Nellie Poague.)

Q. Is there a crack across the arch of the bay window in the ceiling? A. Yes, sir.

Q. What have you noticed about your floors in the front room, if anything?

A. Well, I had—not lately, but I had new floors put in and I noticed they are raising up a little. [45]

Q. They are higher on one side than the other. Is that what you mean?

A. Yes, sir; and they seemed to be not raising up so much as going down.

Q. Are they even or uneven?

A. They are uneven.

Q. West of your front room you just described what kind of a room have you; going toward the back of the house?

A. Well, that's the dining room and the bedroom back there.

Q. What did you find in those rooms?

A. I came home from work about six years ago, off the WPA, and of course it was late at night when I got in, it was after twelve, and I had no more than got in bed when I heard an awful racket and I didn't have the strength to get up right away to see what the racket was but I know it was coming from the back side of the house, and then I did go and all the plaster had fallen off the ceiling in the dining room.

Q. Now then, what did you do that time with the ceiling and dining room?

A. What did I do?

Q. What did you do to it?

(Testimony of Mrs. Nellie Poague.)

A. I got some men that was working on the WPA, when they wasn't working you know.

Q. What did you do with reference to repairing it?

A. They came and fixed it. I got the men to come and fix it and I got the plaster-board from the Largey Lumber Company.

Q. You put plaster-board in that room? [46]

A. Yes, sir, in the dining room.

Q. What else did you do with the room that time, the dining room?

A. That's all it needed to be fixed.

Q. Did you paper the room then?

A. Yes. The Wonnacot paper hanging papered it.

Q. Then what did you discover later?

A. I discovered the water breaking so much, and right at Christmas time, you know.

Q. Before we get into the water. Now let's keep to the dining room?

A. Well, the plaster is bulging, oh, several inches. You can run your hand up.

Q. How long have you noticed that Mrs. Poague?

A. I noticed that for eighteen months or a couple of years now.

Q. And have you a chimney on the north side of the house?

A. Yes sir, but I haven't been able to use that chimney.

Q. Is there one there?

A. Yes, sir, and that heats the dining room.

(Testimony of Mrs. Nellie Poague.)

Well, in fact the whole house; the two bedrooms on the south side and the dining room and front room, but I haven't been able to have—this is the third winter I haven't been able to have a fire in the dining room.

Q. Why not?

A. The chimney was all cracked.

Q. When did that happen?

A. It just started in and kept on cracking more and [47] more and I was advised by workingmen around me, the neighbors, for God's sake not to put a fire in there because if you do you will set your house on fire, and I said yes, sir, and I took their advice.

Q. This is the third winter that has occurred?

A. This is the third winter there hasn't been a spark of fire in the house.

Q. What has been the result with reference to the north half of your house?

Mr. Finlen: Objected to as outside the issues of the case.

The Court: It's not an element of damage but it's descriptive.

Q. What has been the result with reference to the north half of your house?

The Court: Re-frame the question.

Q. What have you been doing with the three rooms on the north side of your house?

A. Just covered up the furniture and let it stand there.

Q. Do you use them?

(Testimony of Mrs. Nellie Poague.)

A. I only just use them for the furniture standing in there because I can't have any fire.

Q. You haven't been occupying any rooms on the upper side as far as using them every day is concerned? A. Oh, no. Oh, no.

Q. Back of the dining room what have you in your house on the north side?

A. It's a bedroom and the trunks and boxes and things from the basement is all piled in there and anybody that [48] wanted—I am not going to do it—could move them and see where the plastering has all fell off.

Q. What have you observed with reference to the back bedroom on the north side?

A. That's the condition its in.

Q. What?

A. I am using it for a store-room now; I can't rent it out.

Q. What have you noticed with reference to the walls?

A. Well, the kitchen chimney as I call it, there is cracks all through and cracks all in the bedroom, you know.

Q. Now with reference to the front of your house, what do you see on the outside of the brick work?

A. Well, right by the front door as you come in the door it's gone down, oh, I will say, well, a couple of inches, and I put a shingle in.

Q. Put a shingle in what?

A. In the side of the front door, in the wall; the

(Testimony of Mrs. Nellie Poague.)

brick wall where this crack is, and I put a shingle in it and I seen the shingle wasn't big enough. It was all right for a while and it kept on going down and I put a piece of board, a little piece of board thicker than that shingle.

Q. That's right by the front door?

A. Yes, sir.

Q. Going south of the front door what did you observe on the front wall?

A. Right by the windows where the woodwork is leaving the brick, the first window, the woodwork seems to be [49] leaving the window; and then the second window in the front of the bedroom, two windows in the bedroom, why it's all cracked in the corner. The bricks are all cracked.

Q. What else did you see on the outside of your house?

A. Then right around, I think it's the front bedroom where the bricks are all cracking—when they started in cracking they leave the red part and they get white. That's how I know that things is going; that's how I know.

Q. Now, Mrs. Poague, inside the front bedroom when did you newly paper that room last?

A. I papered that room last last fall.

Q. What did you observe with reference to the new paper?

A. It looks to me like it's bulging out as big as this, you know, as plain as this up here. (Indicating). Then right back of the door as you go in the bedroom and right back of there the plastering is

(Testimony of Mrs. Nellie Poague.)

all off and Wonnacot put plasterboard there and now it's all bulged; it's all bulged. It cost \$35.00 to have that room papered because I had so much fixing before they could put the paper on, and all over my bed is all cracked and I got window shades and one of my neighbors got old window shades and they said that's the best thing to put on the wall, and that south side window is all bulging again.

Q. Now then, this has happened since you re-paper the bedroom? A. Yes, sir.

Q. Before they re-papered you said they plastered it and fixed it up for you? [50]

A. Yes, sir; they done the best they could.

Q. And it opened up again?

A. Well, it's opening.

Q. How many cracks have you in your bedroom?

A. In my bedroom?

Q. Yes? A. Well, I got four.

Q. Where are they?

A. All in the ceiling except the one right behind the door as you go in.

Q. Where is the one right behind the door as you go in? A. Where is it?

Q. Yes? A. It's facing east.

Q. It's on the west wall then. Is that right?

A. The west wall? No, it would be on the east wall right by the front door but in my bedroom wouldn't it be.

Q. All right, you are right. How high above the floor is that crack?

(Testimony of Mrs. Nellie Poague.)

A. I don't know how high the what you call it, the wainscoating is real high.

Q. You mean the mop-board?

A. Yes, the mop-board.

Q. What have you located there?

A. The floor is kind of going down but the plasterboard is right on top of this.

Q. What, if anything, have you noticed about the floor of your bedroom?

A. It's kind of up and down like. It's got carpet on [51] it and it's not so noticeable, but still I notice it but anybody else wouldn't notice it.

Q. Has there been a change in the last few years on the level of that floor? A. Yes, sir.

Q. What was it before?

A. What was it before?

Q. What change did you notice?

A. When I put the furniture back in this place where I used to put it it will tip to me a little. The floor has been raised up.

Q. How long have you noticed that?

A. For about three years, and the bedroom as I go in, well, I got a man to come and shore that off because it was going down, the door was, and the transoms in the wall like that you can almost get your hand in between the transoms.

Q. When did that happen?

A. It's been happening all the time.

Q. What do you mean by all the time?

A. I mean it's going down more.

Q. Now then, back of your bedroom which you

(Testimony of Mrs. Nellie Poague.)

tell us is on the southeast corner of your building?

A. Yes, sir.

Q. That's the one you just described?

A. Yes, sir.

Q. Going back to the rear of your house what is next?

A. That's a bedroom, and when you go in the hall to this bedroom back of this front bedroom, from behind the door there is a crack there, oh, it will run almost the whole [52] length of that side; you call it, well, that side. (Indicating).

Q. That's the west wall?

A. Yes, the west wall.

Q. The wall toward the rear of the house?

A. And right up by the chimney in this back bedroom I call it it's cracked; well, I call it a slice of pie. It's cracked.

Q. You mean a triangular crack that comes down like a slice of pie? A. Yes, sir.

Q. Two cracks come together?

A. Yes, sir. Over by the bedroom window the paper is all ruffled up and back of the dressing case I have swept up plaster and plaster until I just could—(interrupted).

Q. How long have you noticed the plaster falling in that room?

A. It's been getting worse every day, every day; and it's getng worse from that Emma mine; that mine and them trucks is what has wrecked it and I don't care who says that the mine ain't the cause of

(Testimony of Mrs. Nellie Poague.)

wrecking my house and they are not telling the truth.

Mr. Dwyer: We ask the argument of the witness be stricken from the record.

Mr. Genzberger: No objection.

The Court: It will be stricken.

Mr. Dwyer: We ask the witness be admonished not to argue.

The Court: I granted the motion.

Q. Mrs. Poague, going toward the rear again of this [53] bedroom what room is there in your house?

A. The kitchen.

Q. What did you find in the kitchen?

A. Well, when you come down the hall and cross the kitchen of that side.

Q. Indicating which side. Up the hall is north, toward the alley is west.

Mr. Finlen: I think Mrs. Poague demonstrated she knows the direction better than counsel.

The Court: Are you getting tired?

A. No sir, I am not getting tired, Judge, your Honor, but I am sick and I am nervous. No, I am not getting tired, Judge, your Honor.

(Whereupon, an adjournment was taken until Tuesday, April 1st, 1947, at 10:00 o'clock a.m., when the trial resumed with Mrs. Poague on the witness stand for further direct examination by Mr. Gensberger.)

The Court: Proceed, gentlemen, with the trial.

Q. (By Mr. Genzberger): Yesterday you fin-

(Testimony of Mrs. Nellie Poague.)

ished telling us about the back bedroom on the south side Mrs. Poague? A. Yes, sir.

Q. Did you finish all the cracks and bulges in that room? A. No, sir.

Q. Tell what other cracks or bulges there are?

A. In this room?

Q. Yes?

A. Well, the things I had to move out of the cellar into this room is all cracked and plaster is all falling and has been for quite a while, and I had the doors fixed so I could get in and out and I can't get the window up [54] at all; the roof is going down and I can't get the window up without forcing it and I may break it in there. After you go in the bedroom right here at this door the plaster is all off and I got it fixed up so a person couldn't see, and there is a door there and I got that door locked and can't get it open without forcing it and I don't need it.

Q. Where is this bedroom you are talking about now?

A. Well, you come into the kitchen and its right on the right hand side.

Q. You are talking about the north back bedroom? A. Yes, sir.

Q. Now then, let's go to the south back bedroom on the south side?

A. That's in the main part of the house. That's what you want?

Q. Yes. Tell the court about that?

A. There is a crack in the wall to the west and it's getting larger every day. The crack is just

(Testimony of Mrs. Nellie Allen Poague.)

about to take up the whole entire side of the wall and it will only be a matter of a little while when it's going to cave in; and by the chimney, well, I will describe it the best I can. It's like a slice of pie; it's cracked across like that and getting larger every day, and the two windows in the south side, the two windows in this bed room, the plaster is all leaving and has been for quite a while and it's getting worse every day and nothing ain't doing it but the Emma mine.

Q. But the cracks are getting larger?

A. The cracks are getting larger.

Mr. Finlen: Just a moment. If the Court please, we [55] move to strike that portion of the answer as follows: "Nothing ain't doing it but the Emma mine" as not responsive to the question.

The Court: The motion is granted.

Q. What about the transom over the doorway in the bedroom to the south?

A. I got a paper there so the smoke and dirt can't get in between the transom. The transom runs longways like this over the door and I can't raise the transom up because the roof seems to be coming down and jambing it down and sideways, and I have a paper folded up on the left hand side of the door as I go in the door to keep the dirt and dust out the best I can.

Q. You mean the crack has developed on the left hand side of the transom as you go in the door? A. Yes, sir.

Q. And you filled that up with paper?

A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. What has happened on the right hand side of the transom?

A. Just about the same thing. When you open the door it kind of drags and I got the neighbors when I had to get in there different times to come and take the door off and plane it so I could get in. Smith the keyman.

Q. The door has stuck from time to time?

A. Yes, sir, from time to time.

Q. Now then, we go to the kitchen. What do you find in the kitchen?

A. I guess you call it the west wall. I mean the east wall in the kitchen as you come down the hall of [56] that side from,—well, the moulding of the paper is all cracked and the floor is sinking down and the ice box and little cupboard I have on there lays right up against the wall and I put papers there so it wouldn't break the wooden back off of my cupboard behind it; also a piece of board to keep it kind of in place.

Q. And what, if anything, has happened to the kitchen doors?

A. They are just all chewed up. What I mean by that, chewed up, Judge, Your Honor, and the jury, what I mean when I say chewed up is it's been worked at so much and I couldn't get out and couldn't get in and been picked at so much with hammers and knives and I think I had a scissors a couple of times trying to get it open; and the locks on the doors—I have to have locks on the doors—and I would send for Mr. Smith when I

(Testimony of Mrs. Nellie Poague.)

had money, and when I didn't have any money, and he would always come and fix me up for a while and then it would get bad again.

Q. When you say get's bad you mean it sticks?

A. Yes, and I mean it sticks too. You have to take sledge hammers, axes and hatchets and everything to open it and raise it up.

Q. On the rear of the kitchen you have a back porch? A. Yes, sir.

Q. What material is that made of?

A. That's boards and plaster-board. The outside is boards and then there is paper in between, paper on that and then the plasterboards come. I got Mr. Shannon from the Largey Lumber Company because I knew I could get [57] anything from the Largey Lumber Company I needed.

Q. What did you notice with reference to the back porch I am talking about?

A. That's the back porch and it's going down and the windows are all sticking; there is five windows in there at \$7.50 apiece. The cellar door, now when you come in like this the cellar door is here to go to the cellar and you can't get the door up to get air in there; and when you go down into the basement the main part of the kitchen is down on the door and you can't open that door to get air to the cellar.

Q. In addition to the things you described on the inside of the house that you built, after you acquired the property what did you do with refer-

(Testimony of Mrs. Nellie Poague.)

ence to improving the outside of your house. I am referring to the room?

A. I had about seventeen loads of dirt hauled there from different buildings and I would see the men and I would ask them to dump that dirt and I will pay you for it, and they would do it; and I was working and if I could catch the men I would tell them to go down.

Q. What kind of dirt?

A. Well, they would be digging cellars out.

Q. What did you put on top of that dirt?

A. When I got able I had a man to come and bring me about five or six loads of black dirt and fertilizer and everything so I could have a nice yard.

Q. Did you have a lawn there?

A. I had a lawn in front and I had a lovely garden in the back when I was able to attend to it, but I haven't had one for two years because I haven't been able to put [58] the garden in and take care of it.

Q. Now have you ever had occasion to figure how much money, cash, you have invested in that house?

A. To tell the truth, which I am going to do, and nothing but the truth, I have spent—I don't care who don't believe it—I have spent Ten Thousand Dollars on that place.

Q. You know you have Ten Thousand Dollars in that place?

(Testimony of Mrs. Nellie Poague.)

A. I know I have spent Ten Thousand Dollars on that place.

Q. Mrs. Poague about the first part of December, 1944, what happened to the water pipes in that house?

Mr. Finlen: What year?

Q. Early in December, 1944?

A. They bursted; and in the last two or three years I been pretty sick. I don't like it.

Q. Let's talk about the plumbing.

A. I went down to the kitchen and I seen the water all over everything and I got dressed as soon as I could and I went out. I think it was kind of holidays or something, or Sunday or something when it bursted, and I studied for a minute where would I go to get a plumber. The water was still running in the cellar in places and coming out in the house and running in the house and I studied for a minute and got dressed and I thought——(interrupted).

Q. Well, did you have that fixed?

A. Yes, sir.

Q. How much did that cost?

A. Well I think that was a little job. I think that cost me a hundred, I think it cost about a hundred dollars [59] or a little more, and maybe it was a little less at this time. I know I paid it and I just can't remember.

Q. That was on or about December 11th, 1944?

A. Yes, sir.

Q. And who was your plumber?

(Testimony of Mrs. Nellie Poague.)

A. Mr. Billy Deworkin or something.

Q. He does business with the O'Brien Plumbing & Heating Company? A. Yes sir.

Q. Is that the bill you paid at that time?

A. Yes, this is one of them.

Q. How much is that? A. It's \$144.00.

Q. Now then, did you have another accident or incident to your plumbing immediately after that?

A. Yes, sir. There was a mail clerk coming up the street and I was in bed sick and he came and knocked on the door and said "Did you know your water pipe was bursted," and I said no, sir; and I looked out and I seen the water and then I sent for the plumber again.

Q. That was eleven days later, December 22nd, 1944? A. Yes, sir.

Q. How much was that bill?

The Court: If you are going to refer to documents you better have them marked.

Q. Have you any independent recollection without the bill. Can you remember the amount you paid without the plumbing bill?

A. No. I guess to tell the truth I can't, but I know I strained myself financially to pay these bills because [60] now since the war they don't do like they used to. They would wait until the first of the month and send you the bill but now you have to pay by the week and everything is by the week. If you can't pay this week's plumbing bill—that's the way they done me—they will just stop right there and you are just up against it that's all.

(Testimony of Mrs. Nellie Poague.)

Mr. Genzberger: Any objection to taking the five as one exhibit?

The Court: I certainly don't have any objection.

Mr. Finlen: No objection.

Q. Showing you plaintiff's Exhibit No. 3 consisting of five papers, "D" as the first exhibit and "E" is the second plumbing bill of December, 1944?

A. Yes, sir.

Q. Is that a bill you paid?

A. Yes, sir, \$187.50.

Q. That was paid to whom?

A. Mr. Billy Deworkin.

Q. O'Brien Plumbing & Heating?

A. Yes, sir.

Q. A year later in November did anything happen to your water, November 19th?

A. It was in November it broke. I think it was along or getting on to Thanksgiving or right close in there. I know it was cold weather.

Q. Did it freeze?

A. No, sir; just bursted.

Q. No freeze?

A. I went to Mr. Deworkin.

Q. Showing you plaintiff's exhibits No. 3-C, is that [61] the bill you paid that time?

A. Yes, sir.

Q. To the same plumbing company?

A. To the same Billy Deworkin.

Q. How much was that bill?

A. That bill was \$50.50.

(Testimony of Mrs. Nellie Poague.)

Q. That is the correct amount that you paid?

A. Yes, sir.

Q. Do you know of your own knowledge whether those amounts you paid the plumber were reasonable for the amount of the service and material they rendered that time?

A. Well, I guess according to the way the world is going I thought they was awful steep but that didn't hinder me from having to pay it, and I said to Mr. Deworkin I haven't got nothing.

Q. That was as cheap as you could get the work done that time was it?

A. Yes, sir, and I said I hope to God it will not break again.

Q. Now, Mrs. Poague, what did you consider the value of your property there assuming that there had been no damage done to it and if it was in the same condition it had been before the cracks started showing up?

A. I was so contented there and thought I had a home for life. I am getting away from the subject and I never gave a thought about selling it or anything. All I thought about was I had a home here for life and I am old and sick and I got a home.

Mr. Dwyer: We ask the answer be stricken as not responsive. [62] The witness should confine her answer to the question and it is encumbering this record with a lot of rambling.

The Court: The motion is granted.

(Testimony of Mrs. Nellie Poague.)

Q. Just answer the question. What do you consider your property worth? A. Now?

Q. No, before it was injured?

A. Well I considered my property was worth Ten or Twelve Thousand Dollars.

Q. Have you ever had an offer for it?

A. I had one offer about ten years ago from Mr. Alex Meagher, my neighbor, and he offered me —it was after 1925, and I know that because the garage is there; and Mr. Alex Meagher was a miner and he offered me Eight Thousand Dollars cash and of course I was married at that time.

Q. Did you accept it?

A. No, sir. I told him I would wait a while and see, and I didn't; but, oh, my Lord I am certainly sorry I didn't take it.

Q. Are you a citizen of the United States and of the State of Montana?

A. Yes, sir, and been in Montana for over fifty years.

Q. Now, Mrs. Poague, what is your property worth now in your opinion?

A. Well it ain't worth nothing to nobody else but me.

Q. You don't think you can sell it now?

A. I know I can't. I know I can't because it's so wrecked and I am wondering what to do. [63]

#### Cross-Examination

By Mr. Finlen:

Q. Mrs. Poague, before your name was Poague it was? A. Allen.

(Testimony of Mrs. Nellie Poague.)

Q. Mrs. Allen?       A. Yes, sir.

Q. Miss Allen?       A. Yes, Mrs.

Q. Before you married Charlie Poague you were married to a man by the name of Allen?

A. Sir?

Q. I say before you married Charlie Poague you were married to a man by the name of Allen?

A. Yes, sir; and he is dead.

Q. Charlie Poague is still alive?

A. Well, as far as I know and not being interested in anything I guess Charlie Poague is alive.

Q. What was your name before it was Allen, Mrs. Poague?     A. My maiden name?

Q. Whether it was maiden or married name?

A. I only been married twice.

Q. What was your maiden name?

A. Bentley.

Q. I believe you testified in answer to Mr. Genzberger's question that you lived at 415 South Dakota St. for about thirty-five years?

A. Yes, sir. I think I have been there a little bit more, but that's close enough.

Q. Well, as a matter of fact, Mrs. Poague, you moved in when you bought the property in December, 1910. Isn't [64] that correct?

A. Yes, sir. Well, I didn't move in right away because McGuire the detective—— (interrupted).

Q. Well, within a few weeks?

A. Yes, and my boss told me I would take better care of the place and for me to move in there. I

(Testimony of Mrs. Nellie Peague.)

was working for Mr. George H. Casey that time.

Q. In other words, you have been in possession of the property since the latter part of 1910 or the first part of 1911? A. Yes, sir.

Q. Was the home a new home at that time?

A. No, sir.

Q. Do you know how old it was?

A. No, sir. I have not the slightest idea.

Q. Would you say that relatively speaking it was an old property?

A. Yes, sir, but it looked mighty nice on the outside and after I got it fixed up it looked mighty nice on the inside.

Q. After you acquired the property you installed a bathroom?

A. Yes, sir; put up by the contractor Mr. Turner.

Q. Do you know where he is now, Mrs. Poague?

A. Where Mr. Turner is?

Q. Yes?

A. I don't know. He may be dead, Mr. Finlen; I don't know. There is so many of the business men dying.

Q. When was that bathroom installed?

A. Oh, well—— (interrupted). [65]

Q. About, to the best of your recollection?

A. Well, it's been there for—I had it fixed as well as I can tell the truth, oh, around thirty years.

Q. And after you took possession of the property? A. Sir?

Q. After you took possession of the property in

(Testimony of Mrs. Nellie Poague.)

December, 1910, or January, 1911, you caused a cellar to be dug? A. Sir?

Q. After you acquired the property in 1910 you caused a cellar to be dug? A. Yes, sir.

Q. Did you pay for that cellar, Mrs. Poague?

A. Yes, sir.

Q. Who dug it?

A. Oh, I just can't think of the man's name that fixed my cellar; I just can't recollect.

Q. When was it dug?

A. That cellar was dug, I know it was dug after I had that bathroom fixed.

Q. Not exactly, but to the best of your recollection?

A. To the best of my knowledge I think that was along, oh, it was about '28; it was fixed before 1928 or about 1926 or 1925; along in there about when it was.

Q. Now that cellar consists of a hole under the kitchen about eight feet by eight feet would you say? A. Sir?

Q. It consists of a hole in the ground under the kitchen about eight feet by eight feet?

A. You mean that's the size of the cellar? [66]

Q. Well, I am asking you what it is?

A. Yes, sir.

Q. And around the edges of the hole are boards?

A. Yes, sir; and a concrete floor.

Q. And you built two porches on the house that were destroyed? A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. And about six years ago at the beginning of the WPA? A. I put—— (interrupted).

Q. You put a third porch on?

A. Yes, sir, at the back.

Q. That's the last porch?

A. That's the last porch.

Q. You are sure that that porch was erected or installed at about the beginning of the WPA projects in town?

A. Yes, sir, because I was working there and the man he laid down on me when I would be at work and that's what made it cost so much. He was Swedish.

Q. Who was the man, Mrs. Poague?

A. I don't know his name; he wasn't working and one of the head ladies up to the sewing room she got to talking to me one day and she told me about this carpenter, and he was Swedish, and was a good enough carpenter but he liked to lay down.

Q. Liked to take a little nip now and then?

A. Yes, sir. He had a path worn from the Johnson house over to my house and when I got home in the spring to clean up my back yard where I had some barrels out there with sand and stuff in them, and you know there was more [67] whiskey bottles and I guess you call it, well, you put soda and whiskey together and make some kind of a drink out of it. I don't know what it is because I don't drink myself.

Q. In any event, Mrs. Poague, the two porches

(Testimony of Mrs. Nellie Poague.)

that were destroyed were destroyed before you erected the last porch? A. Sir?

Q. I say that in any event the two porches which were destroyed were destroyed before you built the last porch?

A. Yes, sir; and this second porch that's on there now, on the front now, it's going down; it's leaving where it was close to the house and all around it's going down the ground.

Q. You testified yesterday, Mrs. Poague, I believe that you paid \$2750.00 for the garage in 1925?

A. Yes, sir.

Q. Who built that garage, Mrs. Poague?

A. W. M. Goddard.

Q. W. who?

A. W. M. Goddard, the contractor that put up the Elks home; that contractor.

Q. Walter Arnold? A. Sir?

Q. Walter Arnold was the architect on that?

A. Mr. Goddard had something to do with it too, didn't he?

Q. Is he here now?

A. Mr. Charlie Goddard, the old gentleman?

Q. Yes? [68]

A. I think I asked some white person not so long ago because I wanted to ask him several questions and they said I think he is dead, and I said, "Well, is his son doing contracting work" and whoever this white gentleman is I was talking to he said, "No, he is doing so and so." What I mean is he is doing something else; he is not following

(Testimony of Mrs. Nellie Poague.)

his father's trade; he is contracting on another kind of a job.

Q. In any event you paid \$2750.00 for it?

A. Yes, sir.

Q. Do you remember, Mrs. Poage, the taking of your deposition before a Notary Public, Joseph V. Flaherty, who is also reporting here today, on the 25th of February, 1946, in Butte, Montana?

A. Sir?

Q. Do you remember your deposition being taken by Mr. Flaherty? A. This gentleman?

Q. Yes? A. Yes, sir.

Q. And at that time did you testify that the garage cost close on to \$2100.00?

Mr. Maury: Show the witness the deposition, will you, Mr. Finlen.

Mr. Finlen: I am asking her whether or not she said that.

Mr. Maury: I am asking him to show the witness when he is using the paper. The witness must be shown the document.

The Court: Well, that's true if the counsel is referring [69] to it.

Mr. Finlen: The deposition, if the Court please, is not published.

The Court: He is asking the witness if she made a statement at any time and place. He has not referred to the document at all.

Mr. Maury: He is referring to a deposition that was taken.

(Testimony of Mrs. Nellie Poague.)

The Court: I will overrule the objection.

Mr. Maury: We except.

Q. And at that time did you testify that the garage cost close on to \$2100.00?

A. Gentlemen of the jury, and ladies, and Judge, your Honor, I don't remember of ever—I might have testified at that time but I always claimed and stuck to what I was told when the garage was put up it was \$2750.00 and if I said \$2150.00 well, I don't remember nothing at all about it.

Mr. Finlen: If the court please, we ask leave to publish the deposition of the witness.

The Court: Very well, that will be opened by the Clerk.

Q. Showing you, Mrs. Poague, what has been marked for identification as defendant's Exhibit No. 4 which purports to be your deposition?

A. Yes, sir.

Q. And directing your attention to the signature on page 22 of the instrument which purports to be the signature of one Nellie Allen Poague?

A. Yes, sir. [70]

Q. Is that your signature?

A. Yes, sir.

Q. Directing your attention to the following questions and answers on page 3 of the instrument, Mrs. Poague, were you asked at the time the deposition was taken before Mr. Flaherty on February 25th, 1946, the following question: "Q. The building on the back of the lot, you say is a garage?" And did you reply "It is a garage?"

A. Yes, sir, it's a garage.

(Testimony of Mrs. Nellie Poague.)

Q. And when you were asked "Of what is it made or constructed?" did you reply "Constructed of cement basement; that is what made it cost so much"? A. Well, didn't I mention bricks?

Q. Was that question asked you that time and place, Mrs. Poague, and was that your answer?

A. Well, I said bricks and concrete.

Q. I am asking you if you answered "Constructed of cement basement; that is what made it cost so much"? A. Yes, sir, I answered that.

Q. And were you asked "About how much did it cost, can you tell us?" A. Yes, sir.

Q. And did you reply, "Well, as near as I can remember, it cost close on to \$2100"?

A. I don't remember that statement because I knew it cost \$2750.00.

Q. You read the deposition before you signed it, Mrs. Poague, didn't you?

A. Well, I am going to be truthful; I don't know whether I did or not. [71]

Q. Didn't you make certain corrections in ink after the deposition was shown you, and I direct your attention to page 3 showing an ink correction; I direct your attention to page 4 showing an ink correction; I direct your attention to page 11 showing an ink correction. Is that your handwriting?

A. Well, I guess I am guilty.

Q. Well, it isn't a question of guilt, Mrs. Poague. It's your handwriting, isn't it? A. Yes, sir.

Q. Showing you a correction on page 14, is that your handwriting? A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. And the signature "Nellie Allen Poague" of course is your handwriting?      A. Yes, sir.

Q. Directing your attention to page 15 of the deposition, Mrs. Poague, when you were examined by your counsel, Mr. Maury, I will ask you whether or not you were not propounded the question, "Well now, how much did the garage cost you?"

A. You asking me a question?

Q. I am asking you whether or not that question was asked you?      A. I believe it was asked me.

Q. And I am asking you whether or not your reply was not as follows: "It cost me as near as I can tell the truth and nothing but the truth, the garage cost something over \$2,000. The basement is what made the garage cost so much money." [72]

A. Yes, sir, but I said something over \$2000.00. I didn't say that \$750.00; I said something over. Wasn't that correct?

Q. That's correct, Mrs. Poague?

A. Yes, sir.

Q. Now you say it was over to the extent of a total cost of \$2750.00. Is that correct?

A. Over \$2750? No, I didn't.

Q. To the extent of a total of \$2750.00?

A. \$2750.00.

Q. Mrs. Poague, do you have any receipts or other evidences of what that garage cost or who did the work?

A. No, sir, Mr. Finlen. Oh, the story is too long for me to go into.

(Testimony of Mrs. Nellie Poague.)

Q. You can answer that story, Mrs. Poague, yes or no I believe?

A. Now ask me again; what was your question?

Q. Mrs. Poague, do you have any receipts or other evidences of what that garage cost or who did the work? A. No, sir.

Q. Who was the last tenant in the garage?

A. Mr. Charles MacPherson who is a mail clerk from Butte to Great Falls and lived in the Lloyd apartments close to me.

Q. State, Mrs. Poague, if you know why he ceased to be a tenant?

A. Yes, I certainly can state that. Well, every time when he was on his vacation Mr. Charlie MacPherson would come in—I mean to go out of the garage with his car he would have somebody or get somebody to run around and [73] borrow tools from somebody to do something to the door, and that just kept up and kept up until I just got sick and tired of it and I said to Mr. MacPherson, I said, "Mr. MacPherson, this is the last time I am going to have anybody fix that garage"; not in a mean way, but I said, "I haven't got the money and I am sick and can't do it myself and if you want to stay in there and the door gets stuck so you can't get in or gets stuck so you can't get out you will have to tend to that for yourself and you can stay in there as long as you want to for nothing."

Q. Mrs. Poague, I asked you to state if you knew why he ceased to be a tenant?

A. It was on account of the garage.

(Testimony of Mrs. Nellie Poague.)

Q. The condition of the garage?

A. Yes, the condition of the garage. He got tired of getting out and couldn't get in, and he couldn't get in and couldn't get out and he got tired and he told me his health was kind of failing him and him and his wife was going away.

Q. Directing your attention again, Mrs. Poague, to what's been marked for identification as defendant's exhibit No. 4 which is your deposition, and directing your attention specifically to page 7 I will ask you whether or not you were not asked at the time and place of the taking of that deposition with reference to Mr. MacPherson and with reference to his tenancy of the garage: "And when did he move out, do you know?" Were you asked that question? You better look at the deposition.

A. About when did he move out, do you mean?

Q. Were you asked, "And when did he move out, do you [74] know?" Were you asked that question? A. I believe I was.

Q. And did you reply: "He has been gone about two years. He got transferred. He was a mail clerk on the road, and he got transferred to some place in California." A. Yes, sir.

Q. Mrs. Poague, directing your attention to the second break of the plumbing in December of 1944 concerning which you already testified to when the mail clerk advised you of the break?

A. Yes, sir.

Q. Do you recall that incident?

A. Yes, sir.

(Testimony of Mrs. Nellie Poague.)

Q. Where was that break, Mrs. Poague?

A. Well, I call it the street right where the water goes down and just at the end of the cement sidewalk, just close around in there.

Q. That wasn't on your property was it?

A. Sir?

Q. Was that on your property?

A. Well, whether or not it was on my property when I sent or telephoned to the Water Company about it running several men came down and they told me it was on my property and I would have to have it fixed. That's all I know.

Q. I am asking you with reference to your property line or fence, was it inside your fence or outside?

A. No, sir; it was outside; outside even at the end of the paved sidewalk, the paved walk that goes up and down Dakota. [75]

Q. That was in December of 1944?

A. Yes, sir.

Q. And the other leak concerning which you testified was also in December, 1944?

A. Yes, sir.

Q. Then you had a leak in November, 1945?

A. Yes, sir.

Q. Now, Mrs. Poague, you testified you have invested ten thousand dollars in the house?

A. Yes, sir.

Q. Do you have any receipts or other evidence of that?

A. No, sir. I did have a lot of receipts and kept

(Testimony of Mrs. Nellie Poague.)

them, but my goodness, if I keep all the receipts I got for paying out on that house I would have to come up here and get a box or something in the courthouse or government building.

Q. What was that?

A. I did have receipts at the time but if I continued to keep all the receipts where I paid out twenty-five, fifty, sixty and seventy cents and fifty and one hundred I would have to go to some place and rent some place to keep all them receipts in, and then I was told by business men after so many years and they had been paid why— (interrupted).

Mrs. Poague, does this expenditure you told us about of ten thousand dollars, does that include all repairs to the property as well as improvements?

A. Sir?

Q. Does that include all repairs to your property as well as improvements? [76]

Q. For example, when you put on the bathroom that was an improvement? A. Yes, sir.

Q. That includes all improvements?

A. Yes, sir.

Q. And it also includes all repairs?

A. Yes, sir.

Q. Every time you painted the house it included that? A. Yes, sir.

Q. Every time you would re-shingle the house it would include that? A. Yes, sir.

Q. Does it include the furniture?

A. My God, Lord, no, sir; I bought the most of

(Testimony of Mrs. Nellie Poague.)

my furniture from Mr. Brownfield and Carty Furniture store, and Mr. Strassberger. I had my furniture before I moved, or if I hadn't had it I wouldn't have been able to pay for the home and furniture.

Q. Who did you buy most of it from, Mr. Brownfield and Carty or Mr. Strassberger?

A. Old man Mr. Strassberger.

Q. Was he in the furniture business?

A. He was in the furniture business and a grand old man to me. Of course he would let me have anything I wanted.

Q. Is that Mr. Strassberger's, your engineer's father? A. Yes, sir; that's the gentleman.

Q. Well, I am glad to meet him. I met his son but I didn't know the old gentleman.

A. You didn't know the gentleman? [77]

Q. I didn't know the elder Mr. Strassberger. I know his son quite well. A. Oh.

#### Redirect Examination

By Mr. Genzberger:

Q. Mrs. Poague, have you exhibited your house to representatives of the defendant in this action recently? A. Yes, sir.

Q. To whom did you show your house?

A. You mean?

Q. From the Company?

A. Well, now I understand. Why Mr. Mike O'Connell is one and Mr. Bolever is another, and Mr. Mike O'Connell and Mr. Bolever each of them

(Testimony of Mrs. Nellie Poague.)

had gentlemen with them that I didn't know their names; I didn't know their name.

Q. Mr. Stephenson, this gentleman here. Was he down?

A. I believe that's the name, and Mr.—this gentleman here.

Q. Mr. Finlen?

A. Mr. Finlen was there. The first crowd that came down there was four in the crowd and there was one tall man dressed in blue clothes and I will never forget him.

Q. Do you know the names of anybody else that went down there? Last week who was down there?

A. Mr. Finlen and Mr. Stephenson were down there last week.

Q. Well, before that who was down there?

A. Mr. Bolever and Mr. Mike O'Connell.

Q. Mr. Bolever didn't come down from the Company did he? [78]

A. Yes, sir, because I asked; because I said, "Mr. Bolever, who sent you down here— (interrupted).

Q. Did Mr.—

Mr. Finlen: We ask that the witness be permitted to finish her answer.

The Court: Very well.

A. And he said, "The Company"; and I said, "Yes, sir"; and that's all I said.

Q. Did you see Mr. Curtis down there?

A. Yes, Mr. Curtis.

Q. Which Mr. Curtis?

(Testimony of Mrs. Nellie Poague.)

A. Mr. John Curtis the real estate man.

Q. Who was with him?

Mr. Finlen: We object to this line of questioning.

The Court: Sustained.

Q. And you showed each of those people your house?

Mr. Finlen: We object to that.

The Court: Sustained.

Mr. Genzberger: That is all.

(Witness excused.) [79]

### T. L. DORAN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Genzberger:

Q. State your name?

A. T. L. Doran, 614 West Galena St.

Q. In the City of Butte? A. Yes, sir.

Q. What is your official position?

A. Division Manager?

Q. Of what?

A. The Montana Power Company.

Q. And as Division Manager of the Montana Power Co. what are your duties?

A. I have charge of the operation for the Company in this area.

Q. What does the Montana Power Company sell in this area?

A. Electricity, gas and steam.

(Testimony of T. L. Doran.)

Q. Is there a separate company that has charge of distribution of gas or is it all Montana Power Company?

A. It's the Montana Power Company.

Q. And as such then you have jurisdiction over the gas distribution system in and around the City of Butte? A. I do, yes.

Q. And particularly in that area in the City of Butte which is bounded on the south by the south sideline of Aluminum street, bounded on the north by the north sideline [80] of Silver street, bounded on the east by the east sideline of Main street and bounded on the west by the west sideline of Idaho street?

A. That's a part of our distribution system.

Q. You have jurisdiction over that particular area I described?

A. It's a part of the town distribution system.

Q. And in what manner is gas distributed within the City of Butte and particularly the area I just described? A. Pipe lines.

Q. What kind of pipes?

A. What do you mean by what kind?

Q. Steel, wood, composition?

A. Steel pipe.

Q. What kind of gas?

A. It's natural gas.

Q. Where are they placed with reference to the surface of the ground. I am speaking of the pipes for gas distribution? A. Below ground.

Q. How far below?

(Testimony of T. L. Doran.)

A. I think that probably would vary in some localities, but I am not sure what the depth is in that particular area.

Q. Do you know the size of the gas main that runs north and south on Dakota street between Silver and Aluminum streets? A. I do not.

Q. You don't know the diameter?

A. No, sir. [81]

Q. Do you know the diameter of the mains on Porphyry street? A. No, sir, I do not.

Q. Have you brought with you a record of the service calls caused by injuries or a necessity for repairs in the district which I have heretofore described?

A. I have the orders I believe that are called for in the subpoena that was handed to me.

Q. In what way have you arranged them, Mr. Doran; by streets or by dates?

A. No, I have them by dates.

Q. You prefer to give them to the court and jury by dates?

A. Whichever way you want them.

Q. What is the first service call you have a record of for this area?

A. March 29th, 1940, looks like the first one.

Q. Where is that call?

A. If you will wait for just a moment here.

Q. Certainly.

A. That call is at 435 Colorado street.

Q. On what date, 3-29-40? A. 3-29-40.

(Testimony of T. L. Doran.)

Q. Do you know where 435 Colorado street is with reference to 415 South Dakota street?

A. It's about a block—Colorado would be a block east.

Q. What did you do at 435 Colorado street. When I say you I mean the repairmen from the Montana Power Company insofar as their records and reports to you show?

Mr. Finlen: To which the defendant objects on the [82] ground and for the reason it's incompetent, irrelevant and immaterial; on the further ground it does not prove or tend to prove or disprove any issues in the case. Upon the further ground it's too remote with reference to time. On the further ground it's too remote with reference to place or location; and upon the further ground there is no proper foundation laid to connect the incident or the call with any issue of this case with reference to the calls.

Mr. Maury: We shall show by testimony to be hereafter introduced that a settling of ground breaks gas mains and other mains.

The Court: Well, it's impossible for me to tell at this time from the question as to the materiality of the evidence. So it may or may not be, depending upon the answer of the witness, in my opinion. The objection will be overruled.

If after the answer is made it doesn't appear to be material, of course a motion to strike will be in order.

Mr. Finlen: To save time and not to encumber

(Testimony of T. L. Doran.)

the record may our objections as interposed to this question be interposed to all questions relative to the Montana Power Co.?

Mr. Maury: We agree to that.

The Court: Yes, and the same ruling will be made subject to the same right as to a motion to strike.

Mr. Finlen: And the defendant may in each case be considered to have an exception.

The Court: Very well, an exception will be granted to the ruling of the court. Proceed with the witness.

Q. What did you do at 435 Colorado Street. When I say [83] you I mean the repairmen from the Montana Power Company insofar as their records and reports to you show?

A. Well, the order reads "cut line and install dresser coupling."

Q. Can you tell the court and jury what is a dresser coupling?

A. Well, I am not an engineer but it's called an expansion sleeve. They vary in size and it's put on there to allow for pipe expansion.

Q. I don't think an engineer could have done better, Mr. Doran. Mr. Doran, I neglected to ask you and I will ask you now whether these records are kept by the Montana Power Company in the ordinary course of business?

A. Yes, they are.

Q. Are they true and correct?

(Testimony of T. L. Doran.)

A. To the best of my knowledge and belief they are.

Q. They represent the facts as reported to your office by the men in the field?

A. Yes, the original order is taken by the service crews.

Q. And the reports are made by the service crews back? A. Yes, sir.

Q. That's the regular course of business of the Montana Power Company?

A. Yes, sir; they are regular routine.

Q. They are regular routine records kept by the Montana Power Company in the ordinary course of business? A. Yes, sir.

Q. What is the next call you have in your record in this area? [84]

A. I think it's 522 South Montana street. 522 So. Montana street.

Q. What date is that? A. June 28th, 1940.

Q. Where is 522 South Montana with reference to 415 South Dakota street?

A. A block west and a block south.

Q. And what was the nature of the repair there?

A. They installed an 18 inch nipple and dresser coupling.

Q. 18 inch? A. Yes.

Q. That's also an expansion joint?

A. Yes, sir.

Q. Where is the next call, and when?

A. 652 South Dakota.

Q. What was that date?

(Testimony of T. L. Doran.)

A. That's on September 30th, 1940.

Q. What was done down there?

A. Installed three quarter by twelve inch dresser coupling.

Q. I didn't get the diameter?

A. Three quarter inch by twelve inch.

Q. That would indicate a twelve inch main at that place, would it not?

A. No, that's what I mentioned before. These expansion sleeves are in various sizes and that would be three quarter pipe size by twelve inch in length.

Q. That allowed for expansion up to twelve inches?

A. No, that's the size of the dresser. We don't allow [85] it to that expansion.

Q. Where is 652 South Dakota with reference to 415 So. Dakota?

A. It would be two blocks south.

Q. When is the next date, and where?

A. 202 West Gold street, and that's on November 3rd. Wait a minute. It looks like an eleven and six. This is on April 3rd, 1940.

Q. What was done at 202 West Gold street?

A. Dug surface up and installed dresser stub and new curb box, new curb cock.

Q. Have you anything on there to show the nature of the injury to your line?

A. Just the nature of the call as service broken serving 202 and 204 West Gold. Curb box run over.

(Testimony of T. L. Doran.)

It doesn't say by whom. Evidently somebody drove over the curb box.

Mr. Maury: We move to strike that out. That is not relevant.

The Court: The motion will be granted. The jury is admonished to pay no attention to this particular call.

Q. Where is the next one, Mr. Doran?

A. 115 West Porphyry.

Q. 115 West Porphyry?

A. Yes, on August 22nd, 1941.

Q. Now what is the—what caused the injury?

A. Water Company digger pulled service out of dresser.

Mr. Genzberger: We will withdraw that one, your Honor.

The Court: Very well.

Q. Pass to the next one?

A. The next one is 525 South Dakota, October 10, 1941. [86]

Q. What did you do there?

A. Well, that happened to be a fire there and the note on here is three quarter inch riser from meter cock broken off at the upstream side of three quarter by one house regulator and the service was shut off there.

Q. When and where is the next?

A. 475 South Montana.

Q. And what date?

A. November 4th, 1941.

(Testimony of T. L. Doran.)

Q. What did you find there; what was the cause of it, of the call?

A. Gas leaking through hole in three inch main near service connection.

Q. What was done?

A. Installed three inch dresser leak clamp.

Q. And where was the next one, and when?

A. 522 South Dakota. That's on January 29th, 1942.

Q. What was done there?

A. Found leak in short Dayton couplings seventeen feet east of meter set and installed thirty feet of new service, eliminating one Dayton coupling and one threaded coupling; one ninety degree "L".

Mr. Finlen: That's 522 South Dakota?

A. No, South Idaho.

Q. (By Mr. Genzberger): You gave us Dakota?

A. I am sorry, that's 522 South Idaho.

Q. When and where is the next one, Mr. Doran?

A. 634 Colorado on 5-11-42.

Q. What was the cause of the one there?

A. Found leak on coupling; installed new three quarter [87] by twelve dresser coupling.

Q. Where was the next one?

A. 632 South Dakota.

Q. When was that one?

A. That's on June 5th, 1942. The nature of the call was leak in coupling; cut out coupling and installed three quarter dresser coupling.

Q. When and where is the next one?

A. Rear of 678 South Dakota.

(Testimony of T. L. Doran.)

Q. What was that date?

A. That's on October 7th, 1943.

Q. What did you do there?

A. Installed three quarter by twelve inch dresser coupling.

Q. And what is the next one?

A. 322 South Montana street.

Q. What was that date?

A. This is on 11-1-43.

Q. What was found there?

A. Leak on service line outside of the building.

Q. What was done there?

A. Service line pipe replaced with a wrinkled bend and dresser coupling.

Q. What is a wrinkled bend?

A. That I can't answer; I don't know.

Q. Have you forgotten what that is, Mr. Doran?

A. I had no occasion to forget about it. I didn't know what it was to start out with.

Q. What is the next? Wait a minute. On that, Mr. Doran—go on with the last repair. On that last repair [88] the pipe originally was straight at that place 322 South Montana?

A. I assume that it was.

Mr. Finlen: We ask the answer be stricken.

The Court: Granted.

Q. When was this gas line and service line installed in this area of Butte, Mr. Doran?

A. You mean the entire area?

Q. Yes. When was it put in new?

A. It was put in in 1931.

Q. 1931?

(Testimony of T. L. Doran.)

A. Yes, in the summer of 1931. Generally, that is when the distribution system was installed. As to any particular service installation— (interrupted).

Q. That would have to come after that date?

A. They would come after that date.

Q. The distribution system was built new in the summer of 1931? A. That's right.

Q. Is there anything on or about the last report that you read at 322 South Montana street which shows to your mind a change in direction of the service line?

Mr. Finlen: We object to that on the ground and for the reason it calls for conjecture, speculation and guess; on the further ground that it calls for information not within the knowledge of the witness.

On the further ground that it calls for information that without any showing that the witness is qualified to give this information.

The Court: I think the objection as made will be [89] overruled. There may be some writing on the report itself which says there has been a change in the direction of the pipe line, I don't know. There may be some writing by persons or repairmen that there has been some change in direction. If there is the witness can testify.

A. There is no notation here on the change of the direction.

Q. Nothing on the report showing a straight

(Testimony of T. L. Doran.)

pipe before the accident was changed to a curve pipe after the repair?

A. I read the notation that's shown on here. I read the notation shown on here that it was service line fittings removed from service line and pipe replaced with a wrinkled bend and dresser coupling.

Q. The wrinkled bend is a crooked pipe, is it not? A. I said I don't know.

Q. When is the next one?

A. February 22nd, 1944, 112 West Platinum street.

Q. What was done there. What was the cause of the call there?

A. An expansion there. Thread on two inch main—that's two inch I imagine and I don't know whether that's the main or service—broken on downstream side of valve. Leak repaired with pipe clamp.

Q. And where is 122 West Platinum with reference to 415 South Dakota street?

A. I said 112 West Platinum.

Q. 112, excuse me.

A. Approximately two blocks south.

Q. When and where is the next?

A. 316 South Idaho street on December 20th, 1944. [90]

Q. What did you find there?

A. Service line broken outside of house. Line repaired and put back in service.

Q. When is the next one?

A. January 17th, 1947.

(Testimony of T. L. Doran.)

Q. Where was that?

A. 413 and 415 South Montana street.

Q. Where is that with reference to 415 South Dakota street?

A. A block west and two blocks south. No, it's about a block west.

Mr. Finlen: What address?

Mr. Genzberger: 413-15 South Montana street.

A. January 13th, 1947.

Q. What was the cause of the call there?

A. Service line was pulled out of dresser coupling. The adjustment was made and installed three quarter inch by twelve inch dresser coupling.

Q. When is the next one?

A. That is all the calls we have on services and mains in that area.

#### Cross-Examination

By Mr. Finlen:

Q. Mr. Doran, with reference to the call at 112 West Platinum street? A. Yes.

Q. You testified that was approximately two blocks south from 415 South Dakota street?

A. It's about a block and one-half.

Q. South, and how far east? [91]

A. It wouldn't be east. It would be west of Dakota street.

Q. How far west then?

A. I think it would be about a half a block. I don't know whether that's a through street that's running through there or not. It's between Montana and Dakota on West Platinum.

(Testimony of T. L. Doran.)

Q. Directing your attention to the call at 475 South Montana street? A. 475?

Q. Yes. Does the record concerning that call show anything with reference to the cause of the leak? A. Leak caused by electrolysis.

Q. Excluding that call and directing your attention to the other calls concerning which you testified on direct examination do the records show anything with reference to the cause of any one or more of the various leaks? A. No, they do not.

Q. To what area was your attention directed, Mr. Doran, stating it for the benefit of the jury in terms of blocks?

A. Well, that would be about three blocks south from Silver street to Aluminum, and it would be— (interrupted).

Q. Wouldn't it be more than that, Mr. Doran? Silver to Porphyry, to Gold, to Platinum, to Aluminum?

A. I was starting— (interrupting).

Mr. Maury: Isn't the call in his hand. Have you got the call there?

A. Yes, from the south side of Aluminum to the north side of Silver street. That would be Porphyry, Gold, Platinum and Aluminum. It would be four blocks south. [92]

Q. (By Mr. Finlen): That would be five, wouldn't it; Silver, Porphyry, Gold, Platinum and Aluminum?

A. If you want to take Silver in.

(Testimony of T. L. Doran.)

Q. That's the north boundary, isn't it?

A. The north side of Silver street.

Q. And how many blocks east and west?

A. Four.

Q. What are the west boundaries, Mr. Doran?

A. The east side of Main street and the west side of Idaho street.

Q. Now the street immediately west from Main is what? A. Colorado.

Q. And the street immediately west from Colorado is what? A. Dakota.

Q. And the street immediately west from Dakota is what? A. Montana.

Q. And the street immediately west from Montana is what? A. Idaho.

Q. And during what period of time was your attention directed?

A. Commencing with December 1st, 1939, and ending March 20th, 1947.

#### Redirect Examination

By Mr. Genzberger:

Q. Mr. Doran, the property Mr. Finlen inquired about at 112 West Platinum is practically due south about a [93] block and one-half from 415 South Dakota, is it not?

Mr. Finlen: South by streets or by the compass?

Mr. Genzberger: Due south by the compass?

A. It would be Gold—it would be about a block and one-half south and then probably a half—it's a short block on Platinum.

(Testimony of T. L. Doran.)

Q. It's east of the alley or east of Placer street which is on a line with the alley on the rear of the property at 415 South Dakota street?

A. It's what?

Q. The alley that runs in the rear of 415 South Dakota if extended south would be the street known as Placer street on the corner of which 112 West Platinum is located?

A. I don't know that. I know there is a corner street there.

Q. That's the house you are speaking of where the house is completely demolished? A. Yes.

Q. That's on the corner of Placer and Platinum?

A. Yes, sir. The order shows two. Both addresses I believe that show the order came in from Platinum and Dakota.

(Witness excused.)

(Whereupon, a recess was taken until 2:00 o'clock p.m., same date.) [94]

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### C. L. KAUDY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Genzberger:

Q. State your name, Mr. Kaudy?

A. It is.

The Court: Tell us your name?

A. C. L. Kaudy.

(Testimony of C. L. Kaudy.)

Q. (By Mr. Genzberger): Where do you live?

A. 729 South Dakota street.

Q. What city? A. Butte, Montana.

Q. What is your business?

A. I am carpenter contracting.

Q. Where have you been carrying on that business? A. All over the City of Butte.

Q. For how long?

A. About twenty-two years.

Q. What has been the nature generally of your business?

A. Remodeling and building new buildings and all of that kind of work; any kind of work that comes up in the line of carpenter work.

Q. In the line of building? A. Yes, sir.

Q. Have you had occasion to visit the property of Ella Poague at 415 South Dakota street in Butte?

A. I have.

Q. How often have you been there? [95]

A. Oh, I would say three or four times.

Q. Within what period of time?

A. Possibly a year apart; a year or six months apart; somewhere in there. I can't just recollect.

Q. Are you able from your examination of that building to give us your estimate of the value?

A. Yes.

Q. State what would be the sound value of the building, both buildings. I mean the front building and garage at 415 South Dakota street in Butte if it were not for the injuries that are now on said property?

(Testimony of C. L. Kaudy.)

Mr. Dwyer: To which we object as being incompetent, irrelevant and immaterial. The sound value is not the tested value in this case and the witness hasn't shown himself qualified to give sound value.

Q. I can qualify him further. I will withdraw the question for the time being. State, Mr. Kaudy, what you found with reference to the building as to the number of rooms, its construction, its size, etc.?

A. Well, I can't just remember the size. I don't believe I have that size right here. I don't believe I have it here, but the construction of the building being a brick veneer building, a six room dwelling, I believe I placed—— (interrupted).

Q. Wait a minute. Don't say any values yet. A six room, and in addition to the six rooms was there a bath?

A. There is a small addition in the rear end.

Q. For a bathroom? A. Yes, there was.

Q. And was there a back porch built on the six rooms? [96] A. Yes, there was.

Q. What did you find on the rear of the lot?

A. You mean in the nature of a garage?

Q. Yes?

A. I found a garage back there. I don't recollect the size of that garage at this time but that it was a brick garage and had a good concrete foundation, concrete floors down in the basement; and it had a wood construction floor for the second floor where the cars came in. It was a nicely built building at

(Testimony of C. L. Kaudy.)

the time it was built, and I think I have it here built around the year 1925.

Q. That was what, the garage or house?

A. That was the garage.

Q. Were you in business in Butte in 1925?

A. I was.

Q. Have you any idea what would be the reasonable cost of erecting and constructing that garage in 1925 in the City of Butte, Montana?

Mr. Finlen: We object to that on the ground and for the reason it calls for a conclusion that the witness has not shown himself qualified to give. He testified *he been* in the business about 22 years.

A. I been in Butte, Mr. Finlen, more than twenty-five years.

The Court: He testified he is a building contractor and carpenter. I think he is qualified; for the number of years in Butte I think he is qualified to testify what the reasonable cost of erecting a building such as he saw would be. The objection is overruled.

Mr. Finlen: I wish to add to the objection he has not [97] shown himself qualified for the reason he states he does not know the size of the building.

The Court: He stated he saw the building at that time and he knew the size and that time he knew the building. The objection is overruled.

Mr. Finlen: Exception.

A. Now do I give the price?

Q. (Question repeated.) A. Yes, sir.

Q. How much? A. \$2633.00.

(Testimony of C. L. Kaudy.)

Q. \$2633.00? A. \$2633.00, that's right.

Q. And if you were to construct that or replace that building today what would it cost, Mr. Kaudy?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; the cost of erecting or constructing the building today is not the test of value.

The Court: Overruled.

Mr. Dwyer: Exception.

A. \$3700.00 would be a moderate price.

Q. Have you examined that building in the last few days?

A. No, I haven't, Earle; it's been about thirty days since I been there.

Q. At that time what was the condition of the garage building?

A. Well, it was in very bad condition. Out of line in every way.

Q. What was the condition of the foundation?

A. Very bad. It was all broken up and there would be no way of repairing the foundation in any way. It would have to be torn out of there.

Q. Was it possible to repair the garage?

A. No, not the garage; no.

Q. Would you give us an estimate of the salvage that could be obtained from the garage at this time, if any?

A. I don't think it would be any. I would say none.

Q. Now with reference to the front building, the six-room house with the bathroom. What would

(Testimony of C. L. Kaudy.)

be the original construction price of that so far as you could estimate that?

A. I believe I have that somewhere in the figure.

Mr. Dwyer: Just a minute. We ask the statement be stricken from the record.

The Court: It will be stricken.

Mr. Dwyer: We object to the question as incompetent, irrelevant and immaterial; no time being shown when the original construction took place or that this witness is qualified to give an estimate of what it would cost to construct this building originally.

The Court: It appearing to the Court from the testimony that the plaintiff purchased the lot and building in 1910 it is the opinion of the Court that the construction cost of the building that was constructed prior to 1910 is too remote to shed any light on the issues here, and for that reason the objection is sustained.

Q. Mr. Kaudy, have you from your knowledge of a building contractor in Butte sufficient data at your command to estimate the cost—if necessary to replace it what would [99] it cost today to build a building identical with the Poague dwelling as you last examined it within the last thirty days?

Mr. Dwyer: Objected to on the ground and for the reason the question involves three or more different questions; it's incompetent, irrelevant and immaterial. The witness has not shown himself qualified to answer this question, and it asks for a

(Testimony of C. L. Kaudy.)

conclusion as to whether or not he has data sufficient for certain purposes.

The Court: I will sustain the objection. It's a compound question and several answers would be required.

Q. Mr. Kaudy, have you made an examination of the Poague dwelling?     A. I have.

Q. Do you know of its construction and the materials of which it was constructed?

A. Yes.

Q. When you last saw it what was its condition so far as you can describe it?

A. Its condition was in very, very bad shape. The bricks were giving away, cracking away, and the wall was letting down and the inside of the house is breaking in different places.

Q. From your observation in your opinion was that house and is that house susceptible of being repaired at this time?     A. It is not.

Q. Why not?

A. It is too far gone; too far out of shape. You would have to take the building down in order to do anything with [100] it.

Q. If you had the labor and materials here in Butte at this time could you replace a building such as the Poague residence?     A. I could not.

Q. I mean could you build a building of that kind?

A. You mean could it be done for any certain price?

The Court: He is asking you whether you could

(Testimony of C. L. Kaudy.)

build a house in Butte if you had labor and materials?

A. Yes, sir.

Q. (By Mr. Genzberger): What would it cost today to build a house of the character and dimensions and the material of the Poague residence?

Mr. Dwyer: We object to it as incompetent, irrelevant and immaterial; not the test of value in this case the test being the reasonable market value of the building at the that injury, if any, occurred to it; and the witness has affirmatively shown himself to be disqualified or not qualified with respect to the cost of this building because he does not know the dimensions and that is an essential part, essential record determining what the building would cost.

Mr. Genzberger: Before the Court rules I would like to ask another question.

Q. Did you make measurements of the building at any time?

The Court: Just a minute. Will you read the question back. (Reporter reads question). Well, I am a little uncertain what is meant by material. Do you mean a brick veneer building? [101]

Mr. Genzberger: Brick veneer and rubble stone foundation and composition roof, and the same plumbing that is now in the Poague dwelling.

The Court: Your objection goes to this question I assume, Judge Dwyer.

Mr. Dwyer: We renew the objection to the addi-

(Testimony of C. L. Kaudy.)

tion of the question or the amendment to the question.

The Court: Very well, the objection will be overruled. Do you have the question in mind?

A. No, I don't know as I do. I just have the price of the new building in mind.

The Court: Maybe you better put the question to him again Mr. Genzberger.

Q. Did you any time?

The Court: Put the question to him what it would cost to build that building.

Q. What would it cost to replace the Poague building today with like materials and like dimensions?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial, and not the proper test of value and no proof of the value of the building or proof of any issue in this case.

The Court: Overruled, answer the question.

A. That would be \$8150.00. That is the six-room dwelling with bath.

Q. That would not include the cost of reconstructing the garage?

A. The garage is independent from that.

Q. From your examination of the Poague dwelling what would you say was the salvage value of the materials now [102] in the property?

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial; no proof of any issue in this case; no question to salvage value. The ques-

(Testimony of C. L. Kaudy.)

tion is as to the difference in value now and the value before the injury.

Q. I will withdraw the question. What is the value of the Ella Poague property as it stands today, Mr. Kaudy?

A. Including the garage or the property?

Q. The whole property as it stands today, what is its worth now in the present condition?

A. Well, I wouldn't place any value on it at all.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: No, I think the testimony of the witness said something is of no value.

Mr. Dwyer: He was asked specifically what the value was and he said no value.

The Court: Objection overruled.

Q. Do you mean it has no value today when you say you wouldn't place a value?

A. I don't see any value; I wouldn't place value.

Q. How much is it worth?

The Court: I think he answered the question. Proceed.

A. I would say no value.

Q. You say it's of no value. Would you as a contractor today take a contract to raze those two buildings and pay Ella Poague anything for the salvage material? A. I would not.

Mr. Dwyer: Objected to as incompetent, irrelevant and [103] immaterial; what he would do is no evidence as to value of these buildings.

The Court: The objection is overruled. As I

(Testimony of C. L. Kaudy.)

view it it is not a question that attempts to elicit testimony from the witness as to any particular value of the building. Secondly, if it is the witness was permitted to testify as to his opinion as to the value of the property which included the buildings without objection and it is therefore harmless. The objection is overruled.

Mr. Dwyer: Exception.

Q. What would be the reasonable cost in the City of Butte today of razing the buildings on the lot that we were referring to at 415 South Dakota and refilling the excavation where the buildings had been?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Dwyer: Exception.

A. \$8150.00 as my figure before.

Q. No. How much would it cost to tear down and haul away the wreckage and fill up the holes?

A. I would say \$1000.00.

Q. If the Poague building in its present location were not cracked and injured as you found it what would you estimate the probable life of that building from now on, a building of that like character and construction and sitting on solid ground?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; the witness hasn't shown himself qualified to answer this question; he hasn't shown he knows how old the [104] building is to answer that question.

(Testimony of C. L. Kaudy.)

The Court: I think I will sustain that objection.

Q. Assuming, Mr. Kaudy, that there was an original old building of brick veneer construction existing on that property in 1910; assuming further that certain renovations and improvements were made on that building from time to time consisting of at present a composition roof and new porch within the past six years or ten years, between the last six and ten years; with a new bathroom added about 1917 and a back porch built about 1925, what would you say should be the life such a building of brick veneer construction if built on solid ground?

Mr. Dwyer: I object to the question as assuming facts which are not in evidence and assuming a knowledge of cost of construction of certain improvements which are not given, no evidence given of this; that the hypothetical question presents facts insufficient for any person to determine the life or the possible life of this building. Further that the hypothetical question is insufficient in that it does no give the age of the building or the character of cost, nature or material used in any of the improvements.

The Court: Well unquestionably the hypothetical question is insufficient because it does not give age of the building and there is nothing in the evidence in which the hypothetical question could be predicated upon which the age of the building could be given, so the objection is sustained.

(Testimony of C. L. Kaudy.)

Cross-Examination

By Mr. Finlen: [105]

Q. You state, Mr. Kaudy, you do not know the size of either of these buildings?

A. Well, I have had them measured up, Mr. Finlen, but I just do not happen to have it with me. I don't know the size to the inch but I could guess it. I have the size but not right here at this present moment.

Q. Of what is the garage constructed?

A. It's brick; brick construction with cement walls and cement floor down in the basement; and where the cars roll in at the second floor that's wood construction of two by tens.

Q. The cost or the value of that building then depends upon, among other things upon the number of bricks in the building?

A. I don't believe I understand clearly.

Q. Would not the cost of the building depend upon the number of bricks, among other things, placed in the building?

A. Well, yes, I believe it would all right.

Q. Have you any doubt about that?

A. No, I have no doubt about it.

Q. Would it depend upon the quantity, among other things, of the cement used?

A. I am quite hard of hearing this afternoon. I just came out of where they were welding and my ears are deaf. Will you speak louder.

Q. Would the cost of the building, among other

(Testimony of C. L. Kaudy.)

things, depend upon the quantity of the cement used in the building? A. Yes, I would say so.

Q. Would it depend, among other things, upon the quantity of wood used in the building?

A. Yes, it would all have a bearing on those lines.

Q. It would all have a very important bearing wouldn't it?

A. Yes, the heavier the construction is the longer life the building would be. If it wasn't for the interruption of any ground, any kind of ground movement or anything like that. It was a very well constructed building.

Q. In determining the cost of any building don't you take as a basis the number of cubic feet in the building? A. You do.

Q. And you don't know the size of either of these buildings?

A. I can't recollect it at this moment.

The Court: He said he did measure them and had the sizes that time but he doesn't have a memorandum here with him.

Mr. Finlen: He testified right now as to value. I want to find out how he got that value right now if he doesn't know the size.

The Court: He did know the size and measured that. That's his testimony. He did that and done that recently. The witness hasn't testified he never knew the size of the building or never measured the building.

Q. How far approximately, Mr. Kaudy, from the front fence is the easterly end of the building.

(Testimony of C. L. Kaudy.)

Directing your attention now to the residence?

A. I believe I have all those in my other memorandum [107] book but I haven't them with me here. Ten feet or twenty feet, I don't know.

Q. How far?

A. I wouldn't say ten feet or twenty feet; I couldn't say.

Q. Do you know how high this residence is?

A. No, I don't believe I could say off hand.

Q. How many excavations are there on the property?

A. I believe one for the garage and one for the house. If that's what you mean.

Q. And where is the sidewalk situated with reference to the property?

A. Down South Dakota street.

Q. Where with reference to the dwelling?

A. Right out in front of the dwelling.

Q. Would that be east of the dwelling?

A. That's east of the dwelling; that's right.

Q. There is no sidewalk about the garage at all is there?

A. It seemed like to me there was along the side of the garage a sidewalk.

Q. I am referring to a concrete sidewalk?

A. Yes, I know what you mean.

Q. Off the property?

A. No, I believe it would be on the property.

Q. But there is no sidewalk for the general public to pass along?

A. No, I don't think so.

Q. The only sidewalk accessible to the general public is east of the property line?

(No answer.)

(Witness excused.) [108]

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WADE PLUMMER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Genzberger:

Q. State your name and residence, Mr. Plummer? A. Wade Plummer.

Q. What is your business, or where do you live?

A. 1215 West Gold street, Butte, Montana.

Q. What is your business?

A. Manager of the Butte Water Company.

Q. How long have you been employed by the Butte Water Company?

A. Since September, 1919.

Q. How long have you been the manager?

A. Since November 1st, 1944.

Q. And before that what was your position?

A. Immediately prior to that assistant manager.

Q. And before that were you still employed by the Butte Water Company? A. Yes sir.

Q. In what capacity? A. Superintendent.

Q. And prior to your employment with the Butte Water Company did you have any technical training? A. Yes.

Q. In what kind of work?

A. In civil engineering.

(Testimony of Wade Plummer.)

Q. You have been employed then by the Butte Water Company for many years? [109]

A. Yes, sir.

Q. How many?

A. Nearly twenty-eight years; it will be twenty-eight years in September.

Q. And in what capacities, Mr. Plummer?

A. Various capacities from laborer to manager.

Q. Have you in your present position under your supervision and control the records of the repairs to water pipes, water mains and service lines in the area, in the City of Butte?     A. Yes.

Q. And directing your attention to the portion of the City of Butte which is bounded on the south by the south line of Aluminum street, bounded on the north by the north line of Silver street, bounded on the east by the east side line of Main street and bounded on the west by the west side line of Idaho street, have you records showing repairs made to your lines, mains and service lines in that area?

A. We have records showing repairs to mains but being that we do not own the service lines or repair them we have no records about the service lines.

Q. Will you define so the Court and jury will understand what you mean by mains and what you mean by service lines?

A. The main line is a supply line in the street for the consumers. The service line takes off at the main line for each property.

(Testimony of Wade Plummer.)

Q. And the records under your control and supervision show what? [110]

A. The repairs to the main line.

Q. And all repairs made to the service lines are the business of the individual property owner?

A. Yes.

Q. Are the records that you keep of repairs to your water mains made in the ordinary course of business of the Butte Water Company?

A. Yes, sir.

Q. And are they true and correct?

A. Yes, as far as I know.

Q. And how are they made and to whom are they made?

A. Well, the foreman or the man who does the work he makes out a work report on a slip like those?

Q. And what is done with those reports?

A. They are turned in at the shop office.

Q. And they constitute official records of the Butte Water Company? A. Yes, sir.

Q. You were asked to make a search of those records for the repairs made in the area named by me commencing January 19th, 1940, and ending March 20th, 1947?

A. That's what the subpoena says.

Q. That's what the subpoena says was it?

A. Yes, sir.

Q. Did you make such search?

A. I did.

(Testimony of Wade Plummer.)

Q. How have you arranged that search, Mr. Plummer, by dates or by streets?

A. By dates.

Q. They are chronological? [111]

A. They are chronological.

Q. Will you tell us in chronological order what your records show relative to repairs made?

Mr. Finlen: Are you asking for the first repair?

Mr. Genzberger: Yes.

Mr. Finlen: Objected to as incompetent, irrelevant and immaterial; upon the further ground it doesn't tend to prove or disprove any issue in the case; upon the further ground its too remote with reference to time; on the further ground it's too remote with reference to place, and on the further ground no proper foundation has been made with reference to cause within the issues of this case.

The Court: Well, as to remoteness the objection is overruled. As to materiality it appears to the Court the Court will not be able to determine whether it is material or not material until the witness has answered the question. As to cause it does not appear at this time whether the evidence will or will not be material. So at this time the objection is overruled with the right granted to the defendant should it thereafter appear that the evidence is neither material or competent or that it has not been connected as to cause to move to strike the testimony of the witness.

Mr. Finlen: To save time may our last objection be considered going to each and every question pro-

(Testimony of Wade Plummer.)

pounded this witness concerning any leak or reported leak.

Mr. Maury: We agree.

The Court: Yes, it is so ordered the ruling of the Court would be the same had the objection been made at [112] the time of giving the specific items of testimony by the witness.

Mr. Finlen: It may be considered the defendant with regard to each ruling be noted an exception.

The Court: Yes, the defendant will be granted an exception to each of the rulings of the Court.

Q. Will you tell us in chronological order what your records show relative to repairs made?

A. January 29th, 1940, on Placer street south of Platinum we had a six-inch joint leaking. Shall I just go right through?

Q. What was done towards repairing it?

A. It doesn't say here what was done but just possibly recaulk with lead.

Mr. Finlen: We object to possibilities on the ground its speculative and conjecture.

The Court: Sustained.

Q. What's the next report after that?

A. February 12th, 1940.

Q. Where was that?

A. Platinum street intersection of Idaho.

Q. What was done there?

A. There was a hole in the ten-inch pipe.

Q. Does it show what caused that?

A. No.

Q. What is the next one?

A. On July 7th, 1940, Porphyry street west of

(Testimony of Wade Plummer.)

Dakota street. Several holes in the six-inch pipe.

Q. What was done at that time at that place?

A. The pipe had the holes in it was taken out and a new [113] piece of pipe put in.

Q. How long was the new piece of pipe?

A. Twenty and one-twelfth feet.

Q. When was the next?

A. September 5th, 1940, on Dakota street north of Porphyry street, a joint was leaking.

Q. What was done to fix that?

A. It doesn't say here. Probably just recaulk with lead.

Mr. Finlen: We object to any testimony as to probabilities.

The Court: Sustained.

Q. Your records show on information as to repair?      A. No.

Q. When was the next one?

A. October 4th, 1940, Porphyry street west of Colorado street; six-inch joint leaking.

Q. Does it show what was done with it?

A. No. October 15th, 1940, Placer street north of Aluminum.

Q. What was done there?

A. There was a joint pulled and it shows three feet of six-inch pipe and one six-inch sleeve were used in the repair.

November 12th, 1940, Placer street south of Platinum street, a joint leaking on a six-inch pipe.

Q. When was the next one?

A. December 4th, 1940. Dakota street south

(Testimony of Wade Plummer.)

of Silver street, a joint leaking in the six-inch main line.

Q. Do you know where that location is with reference [114] to the Emma mine shaft?

A. Dakota south of Silver is—the Emma mine shaft, is it between Silver and Mercury?

Silver and Porphyry I think.

A. South of Silver. This would be right directly west then wouldn't it?

Q. Dakota street is the street adjoining the Emma mine on the west? A. I think so, yes.

Q. Do you know what block that is in Dakota street with reference to numbers?

A. Probably the 300 block.

Q. And what repair was made?

A. It doesn't have any listed here.

Q. What is the next?

A. December 5th, 1940.

Q. Where was that?

A. Dakota street north of Porphyry, a six-inch joint leaking; joint of the six-inch pipe leaking.

Q. That's in the same block is it not as the previous one? A. Yes, sir.

Q. Do you know where these two repairs are with reference to 415 South Dakota street?

A. No, sir, I do not.

Q. Assuming 415 is south of Porphyry and north of Gold, where would that be?

A. All three in the same block.

Q. Would be in the block above. You said it was north of Porphyry? [115]

(Testimony of Wade Plummer.)

A. This is north of Porphyry and the last one is south of Silver.

Q. Those are both in the same block?

A. Yes.

Q. Which is one block above the property at 415 South Dakota?

A. This would be the 300 block.

Q. What size main have you running north and south on Dakota street?      A. Six inch main.

Q. What size main have you on Porphyry street?

A. Six inch between—I am not sure—between Dakota and Montana.

Q. Then after December 5th, 1940, where is your next call?

A. December 27th, 1940, Dakota street north of Porphyry. A joint in the six inch main leaking.

Q. Do you know how far north of Porphyry?

A. No.

Q. Do you know where the 27th injury occurred with reference to the December 25th injury?

A. No, sir.

Q. They both show the same annotation, north of Porphyry?      A. That's all.

Q. All right, what's the next one?

A. That's all in 1940.

Q. What's the next one?

A. January 15th, 1941; Dakota street north of Aluminum. One joint of six inch main leaking. No notation on the [116] repairs.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. January 16th, 1941, Dakota street north of Aluminum.

Q. Is that the same one or a different one from the one preceding?

A. That's a different one. This notes three joints leaking.

Q. Three joints leaking? A. Yes, sir.

Q. That is the 600 block on Dakota street, is it not?

A. I think it is. Below Platinum is generally the 600.

Q. That's two blocks below 415 South Dakota on the same street?

A. Yes, sir; it would be that.

Q. All right.

A. January 25th, 1941, Placer street north of Aluminum. A joint in six inch pipe leaking, six inch main. January 30th, 1941, Dakota street north of Porphyry, two joints telescoped, six inch pipe. Five feet of six inch pipe was used in the repair.

Q. How much?

A. Five feet of six inch pipe.

Q. When and where is the next one?

A. February 1st, 1941, Porphyry street east of Dakota; a joint leaking on six inch pipe.

February 2nd, 1941, Porphyry street west of Colorado, a joint leaking on a six inch pipe.

Q. The one on February 1st and February 2nd occurred at different ends of the same block then, did they not?

A. They were in the same block. [117]

(Testimony of Wade Plummer.)

Q. And that is the street next north of 415 South Dakota, is it not, Porphyry street?

A. Would Porphyry be the 400 block?

Q. Porphyry starts the 400 block; Porphyry to Gold is the 400 block?

A. I am not sure about that; it could be. Porphyry to Gold would be the 400.

Q. And this is the beginning of the 400 block these two repairs took place?

A. They are on Porphyry street.

Q. And Porphyry street starts the 400 block on Dakota street?     A. Yes.

Q. When and where is the next place?

A. Which was the last one?

Q. February 2nd.     A. February 3rd, 1941.

Q. Those joints were telescoped or pulled?

A. Those were just joints leaking.

Q. After February 2nd?

A. February 3rd, two joints on the six inch pipe were pulled.

Q. Where was this?

A. Placer street south of Platinum. Three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When and where was the next one?

A. February 15th, 1941, Dakota street north of Gold; a hole in the six inch pipe.

Q. You say a hole. How was the repair made?

A. It doesn't state here, but the hole in the pipe is [118] fixed with a leak clamp.

(Testimony of Wade Plummer.)

Q. When and *were* was the next repair?

A. Dakota street north of Platinum.

Q. What date?

A. March 22nd, 1941; one joint pulled. Seven feet of six inch pipe was used in the repair.

Q. When was the next one?

A. Montana street south of Platinum street; joint in six inch vein leaking.

Q. What date? A. March 28th, 1941.

Q. When is the next one?

A. April 29th, 1941, Montana street south of Gold; joint leaking in six inch main line.

Q. When is next one?

A. June 10th, 1941, Colorado street north of Gold.

Q. That's the 400 block on Colorado street?

A. I think it is.

Q. That's one block east of Dakota street?

A. Yes.

Q. What did you find there?

A. A six inch joint leaking on hydrant "T."

Q. When is the next one?

A. July 5th, 1941.

Q. Where?

A. Three quarter line in rear of 101-105, 109 West Porphyry street. Three holes in the three quarter inch line.

Q. What was done there?

A. It doesn't state. That's a service line anyway, [119] three quarters.

Q. When was the next?

(Testimony of Wade Plummer.)

A. July 29th, 1941, Montana street south of Gold street, one six inch joint pulled. Two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. What is a sleeve, Mr. Plummer?

A. It's a cast iron collar we use as a union to join the two ends of the pipe together.

Q. Permits expansion more than a lead joint?

A. It is a lead joint.

Q. And permits expansion of the pipe?

A. Permits expansion?

Q. Movement?

A. There is always movement to the water pipe underground. It permits a certain amount of movement.

Q. When is the next one?

A. August 23rd, 1941, Dakota street south of Porphyry street; a six inch joint telescoped.

Q. How far south of Porphyry. Anything there to show that?      A. No.

Q. That's in the 400 block on Dakota street isn't it?      A. Yes.

Q. What was done there?

A. Three feet of six inch pipe and one six inch sleeve used. It says six inch valve with joint. Valve, joint must have been telescoped in valve; used a six inch valve and returned a six inch valve.

Q. When is the next one?

A. August 26th, 1941, Dakota street north of Porphyry; [120] three joints leaking.

(Testimony of Wade Plummer.)

Q. That's north of Porphyry again?

A. Yes, sir.

Q. And this time you have three joints leaking?

A. Three joints leaking; yes sir.

Q. What was done?

A. It doesn't state here on the slip.

Q. When was the next one?

A. September 11th, 1941, Montana street north of Platinum; six inch joint pulled; two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next?

A. October 10th, 1941, Dakota street north of Platinum street; six inch joint had pulled; two feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next one?

A. October 13th, 1941, Dakota street north of Porphyry; joint leaking on the six inch main.

Q. Does it say what they did? A. No.

Q. What is the next one?

A. October 14th, 1941.

Q. The following day?

A. Colorado street, south line of intersection of Aluminum street; joint pulled. It says cut out here and doesn't list any repairs, any material repairs.

Q. When is the next one?

A. October 26th, 1941.

Q. Where?

A. Colorado street north of Mercury street. A hole in the six inch pipe. [121]

(Testimony of Wade Plummer.)

Q. That's north of the limits we asked for. North of Mercury you said?

A. Yes, that's out of the limit.

Mr. Genzberger: That may be stricken then.

Mr. Finlen: Colorado north of Mercury.

Mr. Genzberger: Yes.

A. November 1st, 1941, Placer Street north of Aluminum street; one joint leaking in six inch pipe. Next is November 2nd, 1941, Colorado street south of Platinum street; one joint pulled; three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When is the next?

A. November 20th, 1941, Placer street north of Aluminum street; one joint pulled; no repairs.

Q. You mean no repairs or no material?

A. No material used on repairs. It was repaired all-right. November 28th, 1941, Platinum west of Montana, a ten inch, joint on the ten inch main line pulled; two feet of ten inch pipe and one ten inch sleeve were used in the repairs.

Q. When is the next?

A. December 13th, 1941, Montana street south of Platinum street; one joint on the six inch main pulled. Two feet of six inch pipe and one six inch sleeve were used in repair.

Q. When and where is the next?

A. December 19th, 1941, Placer street north of Aluminum. One six inch joint pulled; two feet of six inch pipe and one six inch sleeve were used for repairs.

(Testimony of Wade Plummer.)

Q. When and where is the next? [122]

A. December 26th, 1941, Montana street south of Platinum street; one six inch joint pulled; three feet of six inch pipe and one six inch sleeve were used to repair.

Q. That finishes the year 1941?

A. Yes, sir.

Q. Now when and where was the next repair or the first repair in that area in 1942?

A. January 28th, 1942, Placer street south of Platinum; a six inch joint leaking.

Q. When was the next one?

A. February 18th, 1942, Dakota street north of Porphyry; four joints leaking.

Q. That's the same block on which you made a number of previous repairs, the 300 block on Dakota street?

A. No material used on the repairs.

Q. What was done there for those four joints?

A. Probably just caulk and lead.

Q. When and where was the next?

A. March 4th, 1942, Dakota street north of Platinum street; a hole in the six inch pipe.

Q. Where is the next?

A. March 4th, 1942, Dakota street north of Platinum; one joint leaking in the six inch main line.

Q. Have you any information to show how far the last two repairs were apart?

A. No. Here is one here, Dakota south of Platinum.

(Testimony of Wade Plummer.)

Q. The one south of Platinum and the other north of Platinum. I had both from north of Platinum?

A. Dakota north of Platinum and Dakota north of Platinum, both of them. [123]

Q. What is that?

A. This is a hole in the six inch pipe. It was right at the intersection of the north property line on Platinum street right in line with the diagram in the back.

Q. Where was the second one on March 4th?

A. It isn't designated here.

Q. It just says north of Platinum?

A. That's all.

Q. Let's go to the next one?

A. Montana street south of Platinum; six inch joint pulled. That was March 5th, 1942.

Q. March 5th?

A. Yes, sir; two feet of six inch pipe and one six inch sleeve were used.

Q. And when is the next one?

A. March 10th, 1942, Porphyry street and Colorado. That must be the intersection. Two joints on a six inch valve were leaking.

Q. When was the next?

A. May 1st, 1942; one joint leaking on six inch line.

Q. Where?

A. Montana street south of Platinum.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. May 10th, 1942, Montana street south of Silver; six inch joint leaking.

Q. Can you tell how far south of Silver?

A. Eighty-nine feet south of the south property line of Silver.

Q. When and where is the next one?

A. June 12th, 1942, Dakota street north of Platinum [124] street; one joint pulled.

Q. Did you say north or south of Platinum?

A. North of Platinum; three feet of six inch pipe and one six inch sleeve were used in the repair.

Q. When and where is the next one?

A. June 15th, 1942, Montana street south of Platinum street; one joint pulled.

Q. When and where is the next one?

A. June 19th, 1942, Platinum west of Montana street; a hole in the ten inch pipe.

Q. When and where is the next one?

A. June 23rd, 1942, Colorado and Porphyry street; the south valve.

Q. Where was that with reference to the Garfield school building?

A. I don't recall just where it was in reference. The Garfield school faced on Colorado street.

Q. The Garfield school was it not on the southeast corner of the intersection of Porphyry and Colorado streets?

A. I can't recall the east and west streets right now.

(Testimony of Wade Plummer.)

A. There was a six inch joint leaking near the valve.

Q. What did you have to do with it?

A. Caulked with lead I imagine. It didn't say anything.

Mr. Finlen: We ask it be stricken.

Mr. Genzberger: No objection.

The Court: Granted. [127]

Q. Where is the next?

A. September 24th, 1942, Montana street north of Platinum.

Q. What was that?

A. One six inch joint had pulled.

Q. When is the next one?

A. September 1st, 1942, Main street north of Aluminum.

Q. What happened over there?

A. One six inch joint pulled.

Q. Where is the next one and when?

A. October 4th, 1942, on Silver street line intersection of Main street; six inch joint leaking.

Q. What was done there?

A. It doesn't state.

Q. When is the next?

A. October 6th, 1942.

Q. Where was it?

A. Tapping clamp for 671 South Main street; the tapping clamp was leaking.

Q. When is the next one?

A. October 7th, 1942, Montana street south of Silver; six inch joint pulled.

Q. How far south of Silver?

(Testimony of Wade Plummer.)

A. Eighty-six feet south of the south property line of Silver.

Q. When was the next one?

A. October 20th, 1942, Montana street north of Silver street; three joints leaking in the ten inch main.

Q. When is the next one?

A. November 5th, 1942, Dakota street north of Aluminum. [128] Six inch joint pulled.

Q. When and where is the next one?

A. December 3rd, 1942; Idaho street north of Porphyry. One six inch joint pulled.

Q. What's the next date you have?

A. 1943 now.

Q. That finishes 1942?

A. Yes, sir. 1-16-43, Dakota street south of Platinum. One six inch joint pulled.

Q. When is the next one?

A. February 3rd, 1943, Placer street south of Platinum street; one six inch joint pulled.

Q. Another six inch joint? A. Yes, sir.

Q. When is the next one?

A. March 17th, 1943, Dakota street north of Platinum street; one six inch joint pulled.

Q. When is the next one?

A. March 24th, 1943, Porphyry street west of Colorado; one six inch joint leaking.

Q. What was done there?

A. The joint was cut out and three feet of six inch pipe and one six inch sleeve were used in the repair. 4-12-43, Porphyry line intersection of

(Testimony of Wade Plummer.)

Dakota; joint leaking on north side of the valve.

Q. What was done?

A. It doesn't state here what was done.

Q. When and where is the next one?

A. 5-8-43.

Q. May 8th? [129]

A. Yes, it would be May 8th; it says 5-8 here.

Dakota street south of Mercury street; joint leaking on the six inch main line.

Q. Where is the next one?

A. May 9th; 5-9-43. Main street intersection of Porphyry street. Two 8 inch joints leaking.

Q. And where is Main and Porphyry with reference to Dakota street and Porphyry street?

A. Main street would be two blocks east.

Q. And where is the next after May 9th, 1943?

A. May 26th, 1943.

Q. Where is that?

A. Dakota street north of Porphyry.

Q. What did you find there?

A. Two six inch joints leaking.

Q. And how far south or how far north of Porphyry? A. It doesn't state.

Q. Does it state anything with reference to the previous reports at that place or that block?

A. No.

Q. All right, when is the next one?

A. June 23rd, 1943, Placer street north of Aluminum. One six inch joint leaking.

Q. When and where is the next?

A. July 10th, 1943.

Q. Where is that?

(Testimony of Wade Plummer.)

A. Dakota street south of Platinum street. Joint leaking on the six inch main.

Q. When and where is the next?

A. July 22nd, 1943, Idaho street north of Silver; one [130] joint pulled.

Q. When and where was the next one?

A. August 12th, 1943, Colorado street north of Platinum street.

Q. North of Platinum? A. Yes, sir.

Q. What did you find there?

A. One six inch joint pulled.

Q. When and where is the next one?

A. August 15th, 1943. Dakota street south of Porphyry street; two six inch joints telescoped.

Q. Can you find where south of Porphyry this occurred?

A. It says right on the valve. It must have been; the valves are on the property line so it must have been on the south property line of Porphyry street and Dakota.

Q. Where is the next?

A. August 20th, 1943.

Q. Where is that?

A. Montana street south of Porphyry street.

Q. What was there?

A. One six inch joint telescoped.

Q. What was done there?

A. That joint was taken out and three feet of six inch pipe and six inch sleeve was used as repairs.

Q. When and where is the next one?

(Testimony of Wade Plummer.)

A. October 28th, 1943, Dakota street north of Porphyry street.

Q. Can you find out how far north?

A. No, it doesn't state here.

Q. What was found there? [131]

A. One joint in the six inch main was leaking.

Q. That joint replaced?

A. No, just recaulked.

Q. What was the next one?

A. November 6th, 1943; Montana street south of Platinum street.

Q. What was there?

A. Found a joint had pulled.

Q. What was the next one?

A. December 24th, 1943; Idaho street south of Platinum street.

Q. What was there?

A. One six inch joint had pulled.

Q. When is the next one?

A. That's the end of 1943.

Q. That winds up 1943?      A. That's right.

Q. For the year 1944 what have you?

A. That will be next. January 15th, 1944; Idaho street south of Platinum.

Q. What was that?

A. A six inch joint had pulled.

Q. Can you tell whether or not that was the same joint was pulled on December 24th, 1943?

A. No.

Q. All right, where is the next one?

(Testimony of Wade Plummer.)

A. February 10th, 1944, Porphyry street west of Colorado; six inch joint pulled.

Q. When is the next one?

A. March 1st, 1944; Placer street south of Platinum. [132]

Q. What was that?

A. One six inch joint had pulled.

Q. When and where is the next one?

A. March 4th, 1944, Idaho street north of Platinum street.

Q. What did you find there?

A. A joint on a hydrant "T" leaking.

Q. What is the next one?

A. April 14th, 1944, Main street north of Aluminum street; a hole in a six inch pipe.

Q. Where is the next one?

A. April 28th, 1944, Placer street north of Aluminum street.

Q. What was there?

A. One six inch joint had pulled.

Q. What's the next date?

A. July 30th, 1944.

Q. Where was that?

A. Joint on a south valve at Colorado and Porphyry.

Q. What was done there?

A. It was taken out. The valve was taken out and a new one put in and three feet of six inch pipe and one six inch sleeve were used.

Q. You had no calls in that district between

(Testimony of Wade Plummer.)

April 28th, 1944, and July 30th, 1944?      A. No.

Q. When was the next?

A. September 28th, 1944, Main street north of Silver street.

Q. What was found there? [133]

A. An eight inch joint pulled.

Q. When and where were you next called?

A. December 18th, 1944; Montana street north of Porphyry.

Q. What did you find there?

A. A six inch joint had pulled.

Q. That's the lower part of the 300 block on south Montana street is it not?

A. It would be the lower halfway between Porphyry and Silver.

Q. The lower half of the block?

A. Yes, sir. That's all of 1944.

Q. Starting with the year 1945, Mr. Plummer, when was the first service call that you had and where?      A. January 17th, 1945.

Q. Where?

A. Montana south of Silver street.

Q. And what was there?

A. Joint pulled; six inch joint.

Q. Can you tell how far south of Silver?

A. One hundred twenty-two feet south of Silver; the south property line of Silver.

Q. When was the next one?

A. January 27th, 1945. Dakota street north of Aluminum street.

Q. What was there?

(Testimony of Wade Plummer.)

A. A six inch joint on the main line pulled.

Q. When was the next one?

A. February 3rd, 1945, Placer north of Aluminum street.

Q. What was there? [134]

A. Six inch joint had pulled.

Q. When was the next?

A. February 9th, 1945, Colorado street south of Gold.

Q. What was there?

A. A joint on six inch main line was leaking.

Q. When and where was the next?

A. February 10th, 1945, Montana street north of Aluminum street.

Q. What happened there?

A. Six inch joint had pulled.

Q. What was done there?

A. That was cut out and three feet of six inch pipe and one six inch sleeve were used as material for repairs.

Q. When and where was the next one?

A. February 17th, 1945, on Dakota street north of Aluminum street.

Q. What happened there?

A. There was a six inch joint had pulled.

Q. Where is the next one?

A. February 24th, 1945, Colorado street south of Platinum street.

Q. What happened there?

A. A six inch joint was leaking.

Q. Montana street north of Aluminum street is

(Testimony of Wade Plummer.)

the 600 block on Montana street is it not?

A. Montana street north of Aluminum. Between Aluminum and Platinum?

Q. Yes.      A. I think that's the 600 block.

Q. And Dakota street north of Aluminum is the 600 [135] block?      A. I think so.

Q. And Colorado street south of Platinum is likewise the 600 block on Colorado street?

A. I think so.

Q. Where is the next one?

A. March 20th, 1945, Montana street south of Platinum.

Q. That's also the 600 block on Montana street?

A. Yes.

Q. What happened there?

A. Joint pulled on the six inch main line.

Q. When is the next one?

A. March 28th, 1945, Dakota street south of Porphyry.

Q. Can you tell how far south of Porphyry?

A. No.

Q. That is the 400 block on Dakota street is it not?      A. I think it is.

Q. What happened there?

A. Six inch joint was leaking.

Q. Did you use any material?

A. No material.

Q. What happened next?

A. March 29th, 1945, Porphyry street west of Idaho street.

(Testimony of Wade Plummer.)

Q. What happened over there?

A. Six inch joint had pulled.

Q. Then what is the next one?

A. April 9th, 1945, Aluminum street east of Montana street.

Q. What happened there? [136]

A. Four holes in the six inch pipe.

Q. When was the next one?

A. April 9th, 1945, Placer street north of Aluminum.

Q. What did you find there?

A. Six inch joint had pulled.

Q. That is the 600 block on Placer street is it not? A. I think it is.

Q. When and where did you go next?

A. April 16th, 1945, Idaho street south of Platinum.

Q. What was there?

A. Six inch joint had pulled.

Q. And that was the 600 block on Idaho street was it not? A. I think it is.

Q. Where next?

A. June 30th, 1945, Porphyry street west of Dakota street.

Q. What happened there?

A. A six inch joint leaking.

Q. Now that's the block in which the new line was put in within the last six years was it not, Mr. Plummer?

A. New water line? We put a new line in there

(Testimony of Wade Plummer.)

recently but I wouldn't state the exact date without looking up our records.

Q. I noticed that Mr. Doran said one of their gas lines had been injured by a power digger of the Water Company. Was that about the time you put in a new line?

A. That's the time we put in the new line.

Q. On June 30th, 1945, we find the six inch joint leaking? [137]

A. That's right.

Q. Where is that with reference to 415 South Dakota, if you know?

A. Galena to Mercury one, Mercury to Silver two, Silver to Porphyry three; that would be north of 415 South Dakota.

Q. Can you estimate the distance?

A. Not knowing exactly where 415 South Dakota is I wouldn't attempt.

Q. Now then, where and when did you go to the next?      A. July 27th, 1945.

Q. Where was that?

A. Colorado street south of Gold.

Q. What was there?

A. Six inch joint had pulled?

Q. Then where did you go?

A. August 9th, 1945, to Idaho street north of Gold.

Q. What was found there?

A. Six inch joint had telescoped.

Q. When was the next one?

(Testimony of Wade Plummer.)

A. August 29th, 1945, Platinum street west of Montana street.

Q. What was found there?

A. A joint was leaking on the ten inch main.

Q. You have no way of telling whether that's the same main that was fixed on previous occasions?

A. You mean the same joint?

Q. Yes. A. No, no record of it.

Q. When and where is the next one? [138]

A. August 30th, 1945, Idaho street north of Platinum street.

Q. Where is that with reference to the previous break or leak at Platinum west of Montana?

A. Platinum west of Montana and Idaho north of Platinum. That could be a block apart, or a block and one-half; they are on different main lines.

Q. What?

A. They are on different main lines. The Platinum street line is east and west and the Idaho street line is north and south.

Q. And they are within a block of each other, are they not?

A. They could be within a block or could be two blocks apart; I wouldn't attempt to say.

Q. Platinum west of Montana street would be two blocks apart? A. What was?

Q. The first one was Platinum west of Montana street and the other one Idaho north of Platinum?

A. That could be two blocks.

Q. How could that be?

A. One block west and one block north; a block

(Testimony of Wade Plummer.)

west on Platinum and a block north on Idaho, and it could be any intervening distance.

Q. Up to two blocks?

A. Two blocks would be the maximum distance.

Q. What did you find at Idaho north of Platinum?      A. The joint had telescoped.

Q. When and where were you next called? [139]

A. September 7th, 1945; in front of 626 South Montana street.

Q. What was there?

A. The joint had pulled on the six inch main line.

Q. When and where were you called next?

A. September 9th, 1945, Porphyry line intersection of Idaho street.

Q. What was done there?

A. A hole was found in the six inch pipe.

Q. Then when and where were you called?

A. September 16th, 1945, on Placer street south of Platinum street.

Q. What was there?

A. One joint in six inch main line leaking.

Q. When and where did you go next?

A. October 6th, 1945, Dakota street south of Mercury street.

Q. What did you find there?

A. A six inch joint leaking.

Q. That's the second street above, in the second block above the property at 415 south Dakota, is it not?      A. Yes.

Q. When and where did you go next?

(Testimony of Wade Plummer.)

A. October 9th, 1945, Dakota street south of Porphyry.

Q. South of Porphyry street?

A. Yes, sir.

Q. Can you tell where that is with reference to 415? A. No.

Q. That's in the same block as is 415 South Dakota street, is it not? [140]

A. Yes, it is the same block I think.

Q. You can't tell how far south?

A. No, sir.

Q. What did you find there?

A. Found a six inch joint pulled and one six inch joint had telescoped.

Q. There was two joints then that were injured at that place? A. Yes, sir.

Q. When and where did you next visit this area?

A. November 8th, 1945, Aluminum street east of Montana street.

Q. What did you find there?

A. A hole in the six inch pipe.

Q. When and where did you go next?

A. November 9th, 1945, went to Platinum street lining intersection of Idaho street.

Q. What did you find there?

A. A hole in the ten inch pipe.

Q. A hole would be a break, Mr. Plummer?

A. Well, it would be a hole in the pipe.

Q. A fracture in the pipe?

(Testimony of Wade Plummer.)

A. No, just where electrolysis had eaten a hole in the pipe.

Q. Anything on this ticket to show the cause?

A. No, but the whole theory of corrosion is electrolytic and if you have a hole in the pipe it's corrosion.

The Court: That is from the pipe being in the ground and the water running through it?

A. That's right; it starts a little electric cell of [141] low amperage or low capacity and if it wasn't for electrolysis the pipe wouldn't deteriorate.

Q. That wouldn't have anything to do with the condition of the ground movement?

A. Nothing at all. November 10th, 1945, Platinum street intersection of Idaho street.

Q. (By Mr. Genzberger): What did you find there?      A. Ten inch joint was leaking.

Q. You haven't anything to show the relative locations of the visit you made to fix a hole at that intersection on November 9th and this joint pulled on November 10th?

A. No, we had the hole located in which we had the hole in the pipe.

Q. No connection between the two injuries there?      A. No connection at all.

Q. Two separate injuries?

A. That's right.

Q. Where is the next one?

A. November 15th, 1945, Platinum street east of Idaho. Hole in the ten inch pipe.

Q. Where is the next one?

(Testimony of Wade Plummer.)

A. November 16th, 1945, Dakota street north of Aluminum.

Q. What was there?

A. The six inch joint had pulled.

Q. Where is the next?

A. December 6th, 1945, Colorado street south of Porphyry.

Q. That's the 400 block on Colorado street?

A. Yes, I think it is.

Q. What was there?

A. Two joints at the valve leaking.

Q. Where next?

A. December 8th, 1945, Montana street north of Porphyry.

Q. What did you find there?

A. Six inch point had pulled. That's all for 1945.

Q. Have you the records of 1946? When is the first service call to this area?

A. January 21st, 1946.

Q. Where did you go?

A. Platinum street west of Montana.

Q. What did you find there?

A. A joint on the ten inch pipe leaking.

Q. Did you say broke or leaking?

A. Leaking.

Q. What was done with it?

A. Probably caulked the lead.

Q. When was the next one?

A. January 21st, 1946.

(Testimony of Wade Plummer.)

Q. The same day?      A. The same day.

Q. Where was that?

A. On Main street line intersection of Platinum St.

Q. What was there?

A. Six inch joint leaking.

Q. When is the next?

A. February 3rd, 1946, Montana street north of Aluminum. [143]

Q. What happened there?

A. Joint leaking.

A. When was the next one?

A. April 8th, 1946, Placer street north of Aluminum street.

Q. And what happened there?

A. One joint leaking on a six inch main.

Q. When was the next one?

A. March 26th, 1946, Platinum street line intersection of Colorado.

Q. What happened there?

A. There was an eight inch joint leaking.

Q. When was the next one?

A. August 15th, 1946, Platinum street west of Montana street.

Q. What was there?

A. Ten inch joint leaking.

Q. When was the next?

A. Dakota street north of Aluminum; October 9th, 1946.

Q. What did you find there?

A. A six inch joint leaking.

(Testimony of Wade Plummer.)

Q. When was the next one?

A. November 6th, 1946.

Q. Where was that?

A. Montana and Aluminum street.

Q. What was there?

A. The valve was leaking in the packing.

Q. Where did you go next?

A. November 3rd, 1946, to Main and Platinum street; on the Main street line near the south valve.

Q. What happened there?

A. A six inch joint was leaking.

Q. Where did you next go?

A. December 7th, 1946, Idaho street north of Gold.

Q. That's the 400 block on Idaho street?

A. Yes.

Q. What was there?

A. Six inch joint leaking.

Q. That's the end of 1946?

A. That's the end of 1946.

Q. Now you have some 1947's there?

A. Yes, a few. January 8th, 1947, Placer street north of Aluminum.

Q. What did you find there?

A. One six inch joint leaking.

Q. When is the next one?

A. January 9th, 1947, Colorado street south of Platinum.

Q. What was there?

A. Six inch joint leaking.

Q. That's in the same block north and south

(Testimony of Wade Plummer.)

as the previous one, is it not. It's two blocks to the east?

A. Placer north of Aluminum and Colorado south of Platinum.

Q. Both in the 600 block of the respective streets?      A. Yes.

Q. Where is the next one?

A. January 25th, 1947, Dakota street north of Aluminum street.

Q. That's in the same block south as the previous two, [145] is it not?

A. It would be in the 600 block.

Q. What did you find there?

A. Six inch joint leaking.

Q. When is the next one?

A. February 6th, 1947, Montana street north of Aluminum.

Q. That's also in the 600 block, is it not, Montana street?      A. That's right.

Q. What did you find there?

A. Six inch joint leaking.

Q. When is the next?

A. March 12th, 1947, Dakota street north of Aluminum.

Q. What did you find there?

A. Six inch joint leaking.

Q. That is all of the slips?      A. That's all.

Q. Now, Mr. Plummer, tell the jury the method

(Testimony of Wade Plummer.)

of constructing the distribution lines of the Butte Water Company in the area about which you are now testifying as to the north and south lines and the lateral lines and their interconnection, if any?

A. I don't quite get you.

Q. How do the mains of the Butte Water Company run?

A. They run in the streets, general direction north and south streets. I mean the streets are not compassed north and south but general directions east and west and north and south and they are all in the street, generally on the north side and on the west side of the street; [146] and they are connected together at the intersection of the streets similar to a gridiron.

Q. You have mains running north and south on Dakota streets? A. Yes, sir.

Q. And on Montana street? A. Yes, sir.

Q. And on Colorado street? A. Yes, sir.

Q. And at Porphyry street, for example, there are cross lines connecting Montana street main and Dakota street main and Colorado street main?

A. Yes, sir.

Q. Those are all tied in together?

A. They are all connected together.

Q. In this particular area for the most part you had a six inch steel pipe?

A. That is most part, just six inch steel pipe.

(Testimony of Wade Plummer.)

Q. Some places you said ten inch joint?

A. Yes, sir.

Q. That would involve a ten inch line?

A. Yes, sir.

Q. And eight inch joint means an eight inch line at that particular place?      A. Yes, sir.

Q. How are these pipes connected one with the other?

A. With a bell and spigot joint with lead caulked in.

Q. Explain the bell and spigot joint so the ladies and gentlemen of the jury will understand it?

A. The bell end is enlarged to permit the insertion [147] of the spigot end and the area between the inside of the bell and outside of the spigot we pour hot lead in that and caulk it and that forces the joint.

Q. When you caulk it that means pouring hot lead between the two pieces of pipe?      A. Yes.

Q. The bell end and the spigot end?

A. The spigot end goes into the bell end and leaves an area depending on the size of the pipe how big the area is you pour hot lead in. Which we do, not you.

Q. And the lead forms a binder between the two pipes?

A. It's no good unless you caulk it with a hammer and caulking tool.

Q. After you pour it in, the moulten lead, you hammer it to make the joint tight?

A. Yes, sir.

(Testimony of Wade Plummer.)

Q. What, if anything, does lead caulking have to do with the expansion of the two pipes, the movement, permitting or not permitting movement between the two pipes?

A. It doesn't break the pipe when it moves.

Q. And normally you said a while ago that water pipes move underground? A. Yes, sir.

Q. What causes their movement?

A. Expansion and contraction.

Q. And in laying water mains do you engineers make provision for that normal movement or expansion and contraction?

A. Well, the bell and spigot joint takes care of it to a certain point, but sooner or later it comes to its [148] elastic limit and the constant movement will cause the joint to leak.

Q. What other causes would there be for movement on water pipes?

Mr. Finlen: We object to this, if the court please, as calling for a conclusion and speculation; and doesn't prove or disprove any issue of this case what might cause pipes to leak.

The Court: Well, he is testifying as an expert and calling for expert testimony and for that reason the objection will be overruled.

Q. (Question repeated.)

A. For movement? Water hammer.

Q. And what is that?

A. That is a surge within the pipe of water and it causes a tremendous pressure under certain conditions.

(Testimony of Wade Plummer.)

Q. That is a normal movement?

A. In the distribution system it is.

Q. That is provided for in the original construction?      A. They can't provide for that.

Q. What effect does subsidence of ground have on water pipes in the subsiding ground?

A. It would cause—— (interrupted).

Mr. Finlen: We object to that upon the ground it's speculation; on the ground it's indefinite with reference to the amount of subsidence.

The Court: Overruled.

Q. (Question repeated).

A. Subsiding ground would cause a joint to leak.

Q. And you mentioned several times during the recital [149] of your service calls on repairs on mains that certain joints had pulled. What do you mean by that?

A. That there is an area of—the pipe is under tension. In other words, the pipe had to pull slightly or various degrees out of the joint. I mean one pipe had pulled out of the other.

Q. In some cases you said that the joints had telescoped and in others the valve had telescoped or the joint telescoped into the valve? What do you mean by that?

A. That would be just the opposite, an area of compression in the pipe; the pipe would be under compression.

(Testimony of Wade Plummer.)

Q. What is the effect of a force that puts a pipe under compression? What would you find?

A. What was the effect?

Q. Yes.

A. Well, that would be a telescoping or a buckling.

Q. A telescoping or buckling?

A. Yes, sir.

Q. That would be the spigot joint going too far into the bell joint?

A. That would be a telescoping and might buckle.

Q. Upwards?

A. Or downwards or sideways.

Q. That is due to strain with exceptional force being applied to the pipes in question?

A. It would be quite a force, yes, sir.

Q. And that strain might be up and down on the pipe or along its length or across it, may it not?

A. Well now, wait a minute.

Q. Could you tell? [150]

A. A strain to pull a joint would be lateral and a strain to telescope a joint would also be lateral, but the up and down and crossways force that you spoke of wouldn't tend to telescope or pull a joint.

Q. Would that buckle a pipe?

A. Probably it would put it out of line.

Q. If the pipe was put out of line what happens?

A. That would be various things. It might or might not spring a joint.

Q. When you find that a joint is pulled what

(Testimony of Wade Plummer.)

happens to the water running through the main at the point the joint is pulled?

A. The water still goes through the main. With a lead joint it leaks a very small amount.

Q. If the joint is pulled you wouldn't have a rush of water?

A. Not unless the lead had blown clear out.

Q. If the joint is telescoped what do you find?

A. A small amount of water escaping at the joint.

Q. Then I take it that the pulling or telescoping of a joint will cause a leak if it's of sufficient distance? A. That's right.

Q. How do you account for the exceptional number of leaky joints and telescoped joints in the area about which you have just testified?

Mr. Dwyer: We object to that as assuming a fact not in evidence.

The Court: Sustained.

Q. The number of service calls to which you have testified this afternoon is an exceptional number of calls [151] for that small area of four blocks by four blocks in extent, is it not?

A. I wouldn't attempt to answer that without comparison of other areas, which I haven't done.

Q. These calls you have testified to this afternoon all involve merely injuries to the mains of the Butte Water Company?

A. I wouldn't say injuries entirely.

Q. Abnormalities?

(Testimony of Wade Plummer.)

A. No, they were just water escaping; some of them were injuries.

Q. From the mains of the Butte Water Company?

A. And some of them were just the water escaping; that a joint leaked slightly and no injury to the pipe or the joint.

Q. And they did not include pipe repairs that were necessitated in so-called service lines?

A. No, sir.

Q. Those would not appear on your record?

A. We don't repair them.

#### Cross-Examination

By Mr. Finlen:

Q. Mr. Plummer, you said subsiding ground would cause a pipe to leak. You mean would cause or could cause? A. Could cause.

#### Redirect Examination

By Mr. Genzberger:

Q. And if there was a sufficient amount of subsidence or ground movement, Mr. Plummer, the main would always leak, would it not? [152]

A. Not after you fix it once.

Mr. Dwyer: We object to the question answering itself.

The Court: It seems to be obvious to me, yes.

Mr. Genzberger: That is all.

(Witness excused.)

Mr. Genzberger: May it please the Court, when I had Mrs. Poague on the stand this morning I overlooked that attention to the detail of the house, some of the external things I wish her to testify to at this time, and I now ask leave to recall Mrs. Poague for redirect examination.

The Court: You may.

MRS. NELLIE POAGUE,  
the plaintiff, who heretofore was sworn and testified, was recalled for further

Redirect Examination

By Mr. Genzberger:

Q. Mrs. Poague, you described to the jury certain abnormal or unusual things that happened inside your house. Did you notice in connection with that any sounds that accompanied the injury to your house? A. Well, yes, sir.

Q. What did you observe?

A. Well, when I would be in any part of the house I would hear an awful bumping like; well, almost like [153] thunder and it would shake the house; and several times the dishes and glasses I have upon the little cupboard in the kitchen would rattle and several glasses have been broken.

Q. Do you know what that noise like thunder was? A. I have thought it was blasting.

Q. Did it sound like blasting?

A. Well, it made an awful noise.

Q. What was the noise?

A. Like thunder.

Q. Well, was it an explosion?

(Testimony of Mrs. Nellie Poague.)

A. Well, of course I couldn't see but I could just hear the awful boom like that. Boom, like that.

Q. That's the way it sounded?

A. Boom, like that.

Q. How many of those booms did you hear at a time?

A. Four or five in quick succession.

Q. And what time of the day or night did you observe it?

A. Well, it usually would happen in the midnight, you know; well, oh, around twelve o'clock and three o'clock in the night.

Q. Between twelve and three? A. Yes.

Q. In the night? A. Sir?

Q. Twelve and three in the night you noticed it most? A. Yes, sir.

Q. How often did you hear that boom, boom?

A. I know I must have heard it over ten or twelve or [154] fifteen or twenty times from time to time.

Q. What, if anything, did you hear about the time of those unusual noises with reference to your house?

A. Well, when the pictures on the wall fell, several of them fell and the dishes on the icebox; I had a tray on my icebox with glasses on it and it slid off; and the stove-pipe fell down.

Q. When was that?

A. This is when I would hear this awful booming like.

(Testimony of Mrs. Nellie Poague.)

Q. How long ago was that?

A. That was in—that's about two years ago; between two years ago and about in, oh, 1945 and 1944; along in there, and 1946.

Q. Did you notice anything in your neighborhood that might account for these large noises you heard?

Mr. Finlen: We object to this line of testimony as injecting a new issue in this case.

The Court: Sustained.

Mr. Finlen: We ask that the testimony relative to the so-called shaking or blasting be stricken as not within the issues.

The Court: I think I will deny that. The motion comes too late. I will sustain the objection. As to the motion to strike it comes too late.

Mr. Genzberger: That's all.

Mr. Finlen: We would ask leave to ask a question or two which I should have asked on cross-examination.

Mr. Maury: No objection.

The Court: Very well. [155]

#### Recross-Examination

By Mr. Finlen:

Q. Mrs. Poague, in testifying before, you gave the name of a neighbor of yours who, according to you, gave a cash offer for your house?

A. Sir?

Q. You gave the name of the man that offered you so much cash for your house?

(Testimony of Mrs. Nellie Poague.)

A. Yes, sir; a quite a while ago; a good many years ago, I will say.

Q. How many years ago?

A. Well, I think it was—

Q. Approximately? A. Oh, well, 1927.

Q. 1927? A. I think about.

Q. What was his name?

A. Alex Meagher.

Q. Where did he live?

A. He lived next door to me.

Q. To the south or north?

A. To the north; the double brick next to me.

Q. The house situated between your house and the corner? A. Yes, sir.

Q. What happened to Mr. Meagher; where is he, if you know?

A. A lady told me about a couple or three months ago—it may be longer—that he sent to where his son is a doctor; Camay is a doctor, and young Camay Meagher said he had a cancer of the throat and another lady told me later [156] that he died.

Q. So far as you know then he is dead?

A. So far as I know he is dead, and they brought his remains back here to Butte for burial.

Q. That's Camay Meagher's father?

A. And I think John Meagher is working up on the hill with Mr. Carrigan, I know he has worked with Mr. Carrigan in some capacity for quite a while.

Mr. Finlen: That is all.

(Witness excused.)

Mr. Maury: Mr. Finlen, is it agreed that since 1917 the Butte Copper & Zinc Company, the defendant, has been owner of the minerals in the Emma, the Nellie and Czaroma lodes?

Mr. Finlen: It may be so stipulated.

The Court: Let the record so show.

Mr. Maury: And is the paper marked "Anaconda Copper Mining Company, W. D. Thornton and Butte Copper & Zinc Company of date July 17th, 1917, the original lease between the Butte Copper and Zinc Company and Anaconda Copper Mining Company," or have you an authenticated copy?

Mr. Finlen: I could not state as to that.

Mr. Maury: Was that instrument produced upon notice at another trial?

Mr. Finlen: I believe that instrument was produced [157] upon notice at another trial. Whether it was the original agreement—

Mr. Maury: I didn't think it was the original. I stated an authenticated copy.

Mr. Finlen: It might not have been the original agreement. I mean the first.

Mr. Maury: We offer in evidence this Agreement between the Anaconda Copper Mining Company and Butte Copper and Zinc Company of date of July 16th, 1917, for the purpose of showing that there is no provision in the agreement to in any wise protect the surface.

Mr. Finlen: How has the agreement been identified, Mr. Maury?

Mr. Maury: The agreement is identified. I will

have it marked in this case. It's now marked plaintiff's Exhibit No. 8.

Mr. Finlen: To which the defendant objects on the ground and for the reason it's incompetent, irrelevant and immaterial; and does not tend to prove or disprove any issue in this case, and is not evidence of any issue; and it's particularly incompetent for the purpose for which it is offered and also irrelevant and immaterial for that purpose.

Mr. Maury: You say there is an agreement in it for the protection of the surface?

The Court: Just a minute. Ladies and gentlemen of the jury, there is a legal matter presented for my attention and you will step out into the hall and be at ease for a few minutes.

(Jury steps out of courtroom.) [158]

The Court: Let me see the agreement, Mr. Maury. Well, it seems to me that although apparently it was not offered for that purpose and I might have no right to consider it for that purpose it does seem to me that the agreement is material in support of the allegation of the fifth paragraph of the complaint.

I assume the agreement leases those properties to the defendant. Why isn't it material in support of that allegation?

Mr. Genzberger: That's the purpose of it to show—

The Court: The purpose was limited to show a negative, not a positive.

Mr. Maury: It shows a lease and also shows a

legal condition there is no provision in the lease that the surface shall be protected. I don't want to restrict it.

The Court: I understand the offer was limited to that purpose.

Mr. Maury: No, I don't limit it to that purpose. I just said that's one reason it was offered.

Mr. Genzberger: It's offered with the others for the purpose of showing who was in possession and under what terms, of the Emma mine, and why the operations are being conducted and why we feel the defendant in this case was liable for such operations. This is the connecting link.

Mr. Maury: I might say we will proceed to supplement that offer by an extension right up to 1950.

The Court: I had that in mind, Mr. Maury, but I don't see where it—it seems to me the only portion of this agreement that could possibly be of any materiality here [159] would be the form of lease.

Mr. Maury: There might be many immaterial things, but we called for it in the case as one instrument. We didn't know what was in it.

The Court: The entire thing is offered here?

Mr. Maury: We can't pull a document apart that is presented to us on demand.

The Court: That may be very true but the court has no power to permit many documents that have no bearing on the case at all to be introduced in evidence.

Mr. Maury: We are very glad to shorten the record.

Mr. Genzberger: Your Honor suggests we could offer certain portions of this?

The Court: The rule is that only documents be offered that are material to the issues in the case.

Mr. Genzberger: I admit the greater portion is not material.

The Court: I am not talking about the lease. As I view it the document in its essence is not a lease at all. It's a contract; a contract that is entered into between the Anaconda Copper Mining Co., W. D. Thornton and the Butte Copper and Zinc Company. It looks to the purchase by the Zinc Company of the Czaroma and Nellie Quartz Lode Mining Claims. As I understand it that is the essence of this document here. The contract provides that upon the purchase, if and when that is done, the Zinc Company will execute a lease to the Anaconda Copper Mining Company; and it attaches to the document as an exhibit a form of lease that it will execute if they make the purchase and after the deeds of transfers are made. [160]

Mr. Genzberger: I think the material one is the lease of the 24th of June, 1940, after that purchase had been completed, whereas they recite a previous lease they call it where under date of July 6th, 1917, the Zinc Company as lessor entered into lease with the Mining Company. As a matter of fact I believe the only one material at this time except insofar as regards to the previous lease is this third one not yet marked here but the one in effect June 24th, 1940, which will be offered.

The Court: I don't care to see it now.

Mr. Genzberger: It hasn't been offered yet; it's part of this offer. It will be part of this offer. It will certainly shorten the record to put in the latest one and the current one.

The Court: It may be proper to put in the one Mr. Maury desires to put in.

Mr. Maury: Of course it's a very lengthy document and some of it is extraneous, but we can't separate a document that is presented to us on notice.

The Court: As I view it there are many documents in this offer that are complete and whole in themselves and could have been separately demanded and separately granted. For instance, it's recited here as a part of the contract, and there is offered here as a part of your offer, for instance, a copy of agreement dated August 8th, 1916, by and between the Montana Realty Company and W. W. McDowell, Silver Bow County, Montana. That is part of the document and has nothing to do with it. A copy of assignment from W. W. McDowell as party of the first part to John Gillie as party of the second part. [161] That's also a part of it. There is attached as an exhibit to the lease or to the main contract what is denominated as exhibit "G" which is the lease they say they will make and which is the matter that you deem of importance.

Mr. Maury: We deem that all important and will offer a subsequent document showing that it had been made effective between the parties. Whatever the conditions were about its being fulfilled

they had been fulfilled at a certain time. In October, 1927, they had been fulfilled and then again in June, 1933, and then again in June, 1940; and they all go back to an agreement of 1917, or extend and relate to it. If we can separate that we will certainly be glad to do it to shorten the record.

The Court: The objection as made to the exhibit as offered is sustained upon the express ground that such of it is immaterial to the issue and would be an encumbrance upon the record.

This ruling without prejudice to the plaintiff to offer as an exhibit in the case a lease referred to as Exhibit "G" in the document as offered and purporting to be between the Butte Copper and Zinc Company, a corporation, and the Anaconda Copper Mining Company, a corporation, as of the 6th day of July, 1917, if such lease was actually ever consummated and came into existence.

I think that probably much time could have been saved in the trial of the case if I had of taken due advantage of the authority that I have to hold pre-trial conferences to determine whether there would or would not be any serious question raised as to whether there was or [162] was not a lease existing between the Anaconda Copper Mining Company and Butte Copper and Zinc Company and whether if it was the lease did or did not contain certain provisions. As I view it that should not be any matter of real legitimate dispute.

It's too late for me to do anything about it now but if that question is going to be presented in

other cases I intend in the trial of the other cases to hold pre-trial conferences and thrash that out.

Call in the Jury, Mr. Bailiff.

(Jury returns to the courtroom.)

(Whereupon, an adjournment was taken until Wednesday, April 2nd, 1947, at 10:00 o'clock a.m., when the trial of the case resumed as follows, to-wit:)

The Court: Proceed with the trial, gentlemen.

Mr. Maury: If your Honor please, we offer in evidence a certain part of a record that has been presented to us by the defendant's counsel as being an authentic copy of a lease between the Butte Copper and Zinc Company and the Anaconda Copper Mining Company of date July 6th, 1917. The object is not numbered in this.

The Court: Have Mr. Walker mark it, Mr. Maury.

Mr. Maury: The first page is not numbered. The next page commencing is No. 2 but it can't be number two in this bunch of papers.

The Clerk: It is marked Exhibit No. 8-A.

Mr. Finlen: To which the defendant objects on the ground and for the reason it does not tend to prove or disprove any issues in this case and is wholly without the issues as framed by the pleadings.

The Court: The objection will be overruled, and I [163] think, Mr. Walker, you have marked the Exhibit on the first page No. 8-A.

Mr. Maury: It's not on the first page; it's many pages.

The Court: You marked on the first page of the lease 8-A.

The Clerk: Yes, sir.

The Court: I think on the last page you better mark 8-B so as to show where the exhibit commences and where it ends.

Mr. Maury: It proceeds from 8-A and thereafter the pages are numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13.

The Court: I think that's a sufficient identity of the instrument.

(Plaintiff's Exhibit 8-A Lease contained in Exhibit No. 8, pages 1 to 13 inclusive, dated July 6, 1917, was here admitted in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

[Plaintiff's Exhibit No. 8-A set out on pages 371 to 382.]

Mr. Finlen: My understanding is merely the pages designated are offered and not the entire instrument?

The Court: I understand the pages designated constitute the entire lease. That is true, Mr. Maury?

Mr. Finlen: Constitute the entire lease. That's true yes but he is not offering everything bound together here.

The Court: No. My purpose was to identify the entire lease; that the pages if they were taken from the instrument they would be loose and I want to identify the entire lease. That was my purpose.

Mr. Maury: We now offer in evidence what purports to be an extension of No. 8-A an instrument

of date October [164] 17th, 1927, between the Butte Copper and Zinc Company and Anaconda Copper Mining Company. The same has been presented to me at another time by counsel here as an authentic copy of the original instrument which was called for.

The Court: Any objection to the offer?

Mr. Finlen: Defendant objects to the introduction or the reception in evidence of what has been marked for identification Plaintiff's Exhibit No. 9 on the ground and for the reason that it does not prove or tend to prove or disprove any issues in the case. On the further ground it is fully without the issues as tendered by the pleadings.

The Court: The objection will be overruled and the exhibit will be admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 9 was here offered and received in evidence, the same being an extension of lease Exhibit 8-A dated October 17, 1927, and the same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 9 set out on pages 382 to 386.]

Mr. Maury: We offer in evidence instrument dated June 1st, 1933, between Butte Copper and Zinc Company and Anaconda Copper Mining Company purporting to be a further extension of 8-A. This is the document which was given to me in response to a call in another case and it being an authentic copy of an original which the counsel said was in New York.

Mr. Finlen: Defendant objects to the reception of what has been marked Plaintiff's Exhibit No. 10 on the ground and for the reasons stated in the objection to defendant's Exhibit No. 9; to Plaintiff's Exhibit No. 9.

The Court: The objection will be overruled and the exhibit received in evidence. [165]

(Plaintiff's Exhibit No. 10, further extension of lease, Exhibit 8-A, dated June 1, 1933, was here offered and received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 10 set out on pages 386 to 394.]

Mr. Maury: We offer an instrument of date June 24th, 1940, between Butte Copper and Zinc Company and Anaconda Copper Mining Company from page 1 to page 15 inclusive. This is a paper which was handed to me by counsel for the defendant in response to a notice to produce and it was represented to be and doubtless is an authenticated copy. I wish page 16 added to that. That is an acknowledgement. An authenticated copy of a document which was called for in another suit.

The Court: What is it, a further extension of the lease?

Mr. Maury: Yes, sir, an extension of the lease to 1950.

The Court: Very well, have it marked by the Clerk.

Mr. Finlen: The defendant objects to the offer

and to the reception in evidence of what has been marked Plaintiff's Exhibit No. 11 upon the grounds and for the reasons stated in its objection to the reception of Plaintiff's Exhibit No. 9.

The Court: The objection will be overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 11, a copy of further extension of lease, Exhibit 9-A, pages 1 to 16 inclusive, dated June 24th, 1940, was here received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

[Plaintiff's Exhibit No. 11 set out on pages 394 to 413.]

Mr. Maury: I know of no way to prove the negative of those documents except by reading them.

Mr. Finlen: May the record show we have an exception [166] to the ruling of the court.

The Court: Yes, the defendant is granted an exception in each instance in admitting the exhibits from 8-A to No. 11 inclusive in evidence.

Mr. Maury: I state I know of no way. It's a very tedious proceeding but I know of no way to prove to the jury the negative without reading them.

Mr. Dwyer: We object to the remarks of counsel made in the presence of the jury. He has offered his exhibits and they have been accepted.

The Court: The objection will be overruled. I don't think it is necessary to read each of the exhibits, Mr. Maury. I think a statement from you that none of the exhibits contains the matter that you have referred to should be sufficient. If there

is any question about it counsel for the defense will be permitted to read the exhibit or any portion of it that they contend is material.

Mr. Finlen: If counsel will state what it is he contends the agreement does not contain we will agree to that.

The Court: I think his contention in that regard is that the agreement contains no provision that the Anaconda Copper Mining Co. would protect the surface of the ground in its mining operations. Is that your contention?

Mr. Maury: That's my contention just in the language of the complaint.

Mr. Finlen: The defendant contends the lack of such provision is incompetent, irrelevant and immaterial; it admits that the agreement does not contain any such statement. [167]

Mr. Maury: Thank you very much. It saves a great deal of annoying reading.

Mr. Finlen: The agreement does contain a provision that the work will be done in a minerlike fashion. It might be argued that means the substance of what counsel has.

The Court: I think that probably would be a question but that will be a matter of argument. Proceed, gentlemen.

Mr. Genzberger: We will call Mr. Bolever.

## EDWARD BOLEVER

called as a witness on behalf of the plaintiff, being first duly sworn testified as follows:

## Direct Examination

By Mr. Genzberger:

Q. State your name?

A. Edward Bolever.

Q. Where do you live?

A. 2510 Floral Boulevard, Butte.

Q. What is your business or occupation?

A. Real estate.

Q. Where have you followed that business?

A. About thirty-five years.

Q. Where?

A. The 200 block west Park street. [168]

Q. Now I will ask you for how long?

A. For about thirty-five years.

Q. Have you during the course of your experience had occasion to buy and sell real estate in the City of Butte?      A. Yes, sir.

Q. And included in that real estate were there dwelling houses, business properties and even vacant lots?      A. Both; all three.

Q. You have bought and sold them as agent for others as well as for yourself?      A. Yes, sir.

Q. Have you had occasion to examine the residence of Ella Poague at 415 South Dakota street in Butte?      A. I have.

Q. Are you familiar with the surroundings and the nature of the building and the size?

A. Yes, sir.

(Testimony of Edward Bolever.)

Q. And the lots, etc.? A. Yes, sir.

Q. How far is that property from the business section of Butte?

A. Well, I would judge about in the fourth block.

Q. The fourth block? A. Yes, sir.

Q. From the main business street of Butte?

A. From Park street.

Q. And does the location enter into the value of real estate in the City of Butte?

A. It does on account of it being close to the City center. [169]

Q. What in your opinion would be the reasonable value, the reasonable market value of Ella Poague's property if it were not for the elements of underground mining or of neighborhood damage in the neighborhood of the Ella Poague property?

Mr. Dwyer: Objected to on the ground and for the reason the witness has not shown himself qualified or familiar with the elements of underground mining.

The Court: Sustained.

Q. Do you know the locality and are you familiar with the locality in which Ella Poague's property was situated? A. Yes, sir.

Q. Have you observed any unusual incidents in that locality?

A. Only through mining damages.

Q. Do you own property in that locality?

A. I do.

Q. Are you familiar with mining operations in

(Testimony of Edward Bolever.)

that locality insofar as they expressed themselves on the surface?      A. Yes, sir, quite a bit.

Q. Have you had occasion to observe the effect of certain stresses or strains or forces on buildings; on buildings in the neighborhood of Ella Poague's property?      A. Yes, sir.

Q. Can you disregard those things you have observed in the neighborhood and give us the valuation of a six room brick veneer house with a back porch and bathroom and a forty foot by one hundred fifteen foot lot with a garage, a brick and concrete garage on the rear end [170] such as you have seen, if the same was in sound condition what would it sell for in the City of Butte?

Mr. Dwyer: We object to the question as being indefinite and not relating to the specific property in question but relating to some theoretical or imaginary building. The question is incompetent, irrelevant and immaterial and doesn't tend to prove or disprove any issue of this case; what the imaginary building would be worth is not an issue in this case.

The Court: On the objection as made I will overrule it.

Mr. Dwyer: Exception.

A. The value of the property before the damage was done was around five thousand to fifty-five hundred.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: Denied.

Mr. Dwyer: Exception.

(Testimony of Edward Bolever.)

Q. You mean dollars; five thousand to fifty-five hundred dollars? A. Yes, sir.

Q. In its present condition have you examined it? A. Yes, I have.

Q. How much would you give for it or could you get for it in the City of Butte and what would it sell for on the Butte real estate market at the present time?

Mr. Dwyer: We object to the question as being involved, calling for three different answers.

The Court: Sustained.

Q. Did you examine the property recently?

A. Yes, sir.

Q. What is its present market value, Mr. Bolever?

Mr. Dwyer: To what property are you directing the witness' attention, to some imaginary building or the property in question?

Q. What is the value, the present market value, Mr. Bolever, of Ella Poague's property at 415 South Dakota street in Butte?

A. It's very hard to make an estimate of the value under the conditions because you find no buyers now days to buy in that locality.

Mr. Dwyer: We ask the answer be stricken as not responsive to the question.

The Court: Denied.

Mr. Dwyer: Exception.

Q. Could you fix the money value of the Poague property at present?

(Testimony of Edward Bolever.)

A. No, I couldn't tell you just what the thing would bring on the market now.

Q. Has it any value?

A. Scarcely much value to any property that has gone as far as that has been damaged.

Q. What could it be sold for today?

Mr. Finlen: Objected to as calling for repetition.

The Court: Sustained.

Q. Has that property any value at the present time in your opinion?

Mr. Finlen: Objected to as calling for repetition. The witness testified he couldn't tell what it would bring on the market; scarcely has any value.

The Court: I will agree entirely with you, Mr. Finlen, but I will overrule the objection.

Q. Has that property any value at the present time in your opinion?

A. That's hard for me to say what the value would be at the present time.

Mr. Genzberger: That's all.

(Witness excused.)

EDGAR J. STRASSBERGER,  
called as a witness on behalf of the plaintiff, being  
first duly sworn, testified as follows:

## Direct Examination

By Mr. Maury:

Q. State your name to the court and jury?

A. Edgar J. Strassberger.

Q. How long have you lived in Butte?

A. Since '83 or '84.

Q. What is your profession Mr. Strassberger?

A. Civil and Mining Engineering.

Q. Where did you first study that profession?

A. Cornell University.

Q. And when?

A. From 1896 to 1900; and preparatory course  
in 1895.

Q. Did you graduate from that University?

A. Yes, sir; I graduated with the degree of  
Civil Engineering.

Q. After 1900 or at 1900 where did you begin  
the practice [173] of your profession?

A. From 1900 to the present time my practice  
was mainly in Butte, Montana.

Q. Have you practiced it elsewhere?

A. Yes, sir; in Peru, South America.

Q. Have you followed the profession of mining  
engineering as well as that of civil engineering?

A. Yes, sir.

Q. And in Butte? A. Yes, sir.

Q. Elsewhere in Montana? A. Yes.

Q. Anywhere else in Montana?

(Testimony of Edgar J. Strassberger.)

A. Yes, some; well, principally in Butte. I also took special courses in assaying and other branches of mining engineering.

Q. While your residence has been almost most of that time in Butte you have practiced your profession in other counties in the state?

A. Yes, sir.

Q. And elsewhere in South America?

A. Yes, sir.

Q. Are you acquainted with the property of Ella Pogue at 415 South Dakota street in Butte, Montana?      A. I am.

Q. When was that first called to your attention, Mr. Strassberger?      A. I think in 1945.

Q. Mr. Strassberger, when you first examined it did you make memorandum as to the date of your examination? [174]      A. Yes, sir.

Q. Have you got it?      A. I think so.

Q. Can you tell us the date when you first examined it?

A. Just previous to December 5th, 1945.

Q. Within a few days before that?

A. Yes, sir.

Q. Mr. Strassberger, can you give us the legal description of that property. I mean by lot and block number?

A. Lot Four and the north Ten Feet of Lot Five, Block Sixty-seven Butte Original Townsite, being a portion of the Nellie Lode, Survey No. 759, Lot No. 136.

Q. Can you now tell the court and jury what

(Testimony of Edgar J. Strassberger.)

condition you found the property in. First, tell what were the improvements upon the property?

A. The property consists of seven rooms including bath, an enclosed back porch and an open front porch. The building, including the porches, is 50.6 feet long overall and 27.6 feet wide overall. It's a brick veneer having wooden additions for the porches. In the rear is a solid brick and I believe tile constructed double garage built on concrete foundations. The overall dimensions is 20.2 feet by about 20 feet.

Q. What condition did you find the walls and floors, the windows and other parts of the front building in. That is, the building which you spoke of as having six or seven rooms?

A. Well, the south wall of the dwelling is bulged and shows a separation of the brickwork; the east wall facing Dakota street has several cracks in it; near the southeast [175] corner is some cracks between the joints making a sort of step, what we call step-cracks and also a horizontal crack. And further to the north on the front wall near the front entrance is a horizontal crack or separation of the brickwork, oh, about two feet long, and in the corner window of that same entrance there seemed to be a separation right in the corner a vertical separation, and some cracks close to that.

On the northeast corner there is some cracks appearing in the brickwork. On the west end of the building there is some cracks over a window near the northwest corner; and inside of the building

(Testimony of Edgar J. Strassberger.)

that crack appears in the room off of the kitchen, which is the north of the kitchen, and now used as a storeroom, the crack shows through there. The southwest corner of the building is located a bath where I observed some vertical cracks that were pasted up with paper. In the kitchen, on the east wall of the kitchen I observed some cracks. Going into the hall from the kitchen running toward the front of the building are several bulges on the south wall of the hall. The first room to the right and just east of thhe kitchen is a bedroom that shows considerable movement. Its west wall is badly cracked.

The ceiling shows cracks and movement. Across the hall to the north of that room I think it's a dining room. It looks in better condition except the floors; its floor is rather loose and shakes when you walk over it as if the foundation has settled below that room. East of that room is the parlor or front room. It has a sort of a bay window with an arch close to the window. That is cracked. [176] And in that room there are several cracks showing movement.

The room south of the parlor I think is a bedroom, used as a bedroom now; it looks in fairly good condition. There are some cracks in there of minor nature. The south wall of that room is formed by the south building wall which shows bulges mentioned a moment ago.

Q. What have you to say as to the doors?

A. Well, some of the doors stick when you open

(Testimony of Edgar J. Strassberger.)

them and other doors especially in the kitchen it swings open by itself and shows that the frame has been tilted.

Q. And as to the windows?

A. I didn't notice anything especial to the windows. There is some putty loose and cracks, but I could not attribute any cause associated with movement.

Q. Did you notice anything about the chimney. I mean the service chimney to the house?

A. Yes, there is a chimney there. It shows some settlement.

Q. Did you note anything about the transoms to the bedrooms?

A. The transoms appeared to be out of level.

Q. Mr. Strassberger, did you note a garage, a brick and concrete garage that is on the rear end of the lots which you have described, or lot and fraction of a lot? A. I did.

Q. What condition was that it?

A. That was in a dangerous condition.

Q. Now describe in detail?

A. Well, the foundation walls of concrete are badly shattered and broken and fallen to the floor in places. [177] The south wall bulged and finally some of the brickwork fell out.

Q. About how much of the brickwork has fallen out of the south wall?

A. Well, I didn't measure but my recollection last time I was there seemed to be about four feet

(Testimony of Edgar J. Strassberger.)

up and down and maybe twelve or fourteen feet east and west.

Q. Did you take a photograph of that?

A. I did.

Q. Have you got it?      A. Yes, sir.

Mr. Maury: Counsel informs me there is no objection to their introduction. We offer them in evidence. They are marked exhibits 12, 13, 14 and 15.

The Court: Received in evidence without objection.

(Plaintiff's Exhibits Nos. 12, 13, 14 and 15 were here received in evidence, the same being photographs of the garage and dwelling in question. They will be certified to the Circuit Court by the clerk of this court.)

Q. What is exhibit 13 a picture of?

A. The picture 13 is the west face of the west side of the brick garage and it just shows a part of the cracks on the south face that I testified about; cracks and bricks falling out.

Q. What is 14?

A. 14 is a picture taken previous to the one the jury is looking at now.

Mr. Genzberger: Make that number, please. Previous to 13 instead of the one the jury is looking at.

A. This got marked.

Q. Tell what it is? [178]

A. It shows the brickwork had settled and separated along the courses of the brick and bulged out.

Q. What is 12 a picture of?

(Testimony of Edgar J. Strassberger.)

A. 12 is also a picture of the west end of the building showing the garage doors and cracks in the building. May I look at that first picture? I think I gave the wrong face of it. 13 is the east face of the garage.

Q. What is 12 a picture of?

A. 12 is also a picture of the west face showing the entrance doors.

Q. Of the garage? A. Of the garage.

Q. And 15?

A. 15 is a view of the east front of the dwelling on Dakota street.

Q. Are these which have been marked 16, 17 and 18 also pictures of the Poague property?

A. Yes.

Q. Are they the pictures? A. Yes, sir.

Mr. Finlen: May I inquire of the witness as to what Plaintiff's exhibit No. 18 so marked purports to represent?

A. That shows a retaining wall under the fence of the building adjoining the Poague property to the north.

Mr. Finlen: I thought the witness said this represented the Poague property?

A. Part of it is the Poague property.

Mr. Finlen: We object to the reception in evidence of what has been marked plaintiff's exhibit No. 18 as without the issues of the case and not tending to prove or [179] disprove any of the issues of the case.

(Testimony of Edgar J. Strassberger.)

Q. (By Mr. Maury): Does this show the north wall of the Poague property?

A. It shows just a corner of the,—the northeast corner of the Poague property and her east fence.

Q. Does it also show something else?

A. Yes, it shows a cracked wall of the adjoining lot.

Mr. Finlen: We renew our previous objection and further add the objection it would only serve to confuse the issues in the case.

The Court: Does your record show anything has been offered in evidence?

Mr. Maury: Yes, we offered it in evidence.

The Court: You are offering Exhibit 18 in evidence, is that it?

Mr. Maury: Yes.

The Court: You make the same objection you just expressed?

Mr. Finlen: And the additional objection it is confusing in that the notation upon the back of the photograph——

The Court: Well, all of the writing on the back of the photograph except that placed on the back by the Clerk of the Court identifying it as an exhibit will be removed and the objection will be overruled and the exhibit will be received in evidence.

(Plaintiff's Ex. No. 18, a photo of retaining wall N.E. corner of Poague property was here received in evidence. Clerk will certify same to Circuit Court.)

Mr. Maury: There is a serial number D-2 on it.

(Testimony of Edgar J. Strassberger.)

I presume that is some mechanical number. I can't erase it.

The Court: Obliterate it if it can't be erased.

Mr. Maury: Do you want the writing obliterated, taken off? [180]

Mr. Dwyer: With the exception of that one.

Mr. Maury: We have taken it off.

The Court: I think all writings that don't pertain to the exhibit should be taken off.

Q. (By Mr. Maury): What is exhibit 17 a picture of?

A. 17 shows the cracks and the brick veneer at the southeast corner of the building that I testified about a moment ago.

Q. That is of the residence?

A. Of the residence, yes.

The Court: Has 17 been admitted in evidence?

Mr. Maury: We offered 17.

The Court: I didn't hear any offer. Does your record show any previous offer?

Mr. Dwyer: No objection to 16 and 17.

Mr. Maury: 16 and 17 are now offered.

Mr. Finlen: 16 and 17 may be received without objection.

The Court: Very well, they will be admitted without objection.

(Plaintiff's Exhibits 16 and 17 were here received in evidence, being photographs, and will be certified to the Circuit Court by the Clerk of this Court.)

Q. What is 16?

(Testimony of Edgar J. Strassberger.)

A. 16 shows the crack that I testified to a moment ago in the east wall, outside wall of the Poague residence; but, however, the photographer reversed the picture. He took it on the wrong side of the negative and it shows left instead of right.

The Court: Let me see the exhibit. Then it is your testimony, Mr. Strassberger, that because of the method [181] in which the photographer took the picture it does not accurately disclose the condition existed there?

A. It makes it left handed instead of right handed. It looks on the right side of the door when in fact it's on the left hand side of the door.

The Court: Well, Exhibit 16 will be stricken from the evidence.

Mr. Maury: No objection.

Q. (By Mr. Maury): Mr. Strassberger, have you made any study, continued, experimental with property in the immediate neighborhood of this and of brick and concrete construction before you examined this. Just answer whether you have or not?

A. Yes, I have.

Q. And how long did that study continue, approximately?

A. From 1943, the year 1943 to the present time. However, I don't understand your question about making experimental tests.

Q. I call to your attention the property known as the Lloyd property somewhere west of this property? A. Yes, sir.

Q. How far west is it, or was it?

(Testimony of Edgar J. Strassberger.)

A. About ninety feet north and this west crossing alley behind the Poague property. It's on the southeast corner of Porphyry and Montana streets.

Q. Mr. Strassberger, were you once City Engineer of Butte? A. Yes, sir.

Q. At that time were you familiar with a certain plat of the elevations in the region of the Poague property? [182] A. Yes, sir.

Q. And were those elevations at that time recorded as correct and found to be correct whenever any work was done with reference to them?

A. Yes, sir; we used those elevations as official elevations at the block corners and alley corners.

Q. Are the elevations at the Poague property and in and around the Poague property the same as they were then? A. No, sir.

Q. Can you tell us whether they are higher or lower?

A. In places they are higher; in the main they are lower.

Q. When were you City Engineer?

A. 1920 to 1922, I believe.

Q. Mr. Strassberger, were you called on by Ella Poague or her attorneys to study the cause of the abnormalities that you found in her property?

A. Yes, sir.

Q. Did you feel that in order to determine the cause you must examine the surface of property surrounding it? A. I did.

Q. Had you previously made examination of

(Testimony of Edgar J. Strassberger.)

the property in the immediate vicinity of Ella Poague's property?      A. Yes, sir.

Q. You may name one?

A. Well, the closest one would be the Lloyd property.

Q. And on what street corners would that be; was it?

A. It was on the southeast corner of Porphyry and Montana streets.

Q. Had you watched and experimented with that property [183] for a long period of time?

A. Yes, sir.

Q. At the request of the owners?

A. Yes, sir.

Q. And what had you noticed as to whether there was movement in the foundation and ground under it?

A. I observed considerable movement within the building and the foundations.

Q. And did you make a study of the cause of that movement?      A. I did.

Q. Can you tell with relation to the Poague property where the Emma shaft is?

A. Yes, sir; it's about 500 feet north and 220 or 250 feet east.

Q. Can you tell from actual entrance the depth of that shaft?

A. Yes. I have maps furnished by the Company that gives the elevations of the shaft and the different levels.

Q. What was the depth of that shaft in 1945,

(Testimony of Edgar J. Strassberger.)

December, when you examined the Poague property?

A. Well, I couldn't give you that in feet without consulting the maps.

Q. Have you some map here you can consult?

A. I don't think at the bottom of the shaft.

Q. Can you give us the actual depth that you know of existing at that time?

A. May I examine?

Q. Yes, you may examine any data that's been given you by the defendant. Does that indicate the depth of the [184] workings from that shaft. My question is how deep was the shaft. May I ask a leading question. Was the shaft 1600 feet at least in 1945, December? A. Yes, sir.

Q. Now, were you given permission by the persons operating that shaft to go down and inspect the workings under the Ella Poague property?

A. I was.

Q. How often have you had that permission?

A. Ever since 1944 at times that I desired to go down.

Q. What Company gave you that permission?

A. I believe it was the A.C.M. Company.

Q. Anaconda Copper Mining Company?

A. That's right.

Q. And when you wished to go down who would you ask for permission?

A. I think Mr. Genzberger got me the original arrangements, or you; and I would contact either Mr. O'Kelly's office or Mr. Strandberg.

(Testimony of Edgar J. Strassberger.)

Q. Who was Mr. O'Kelly as to the Anaconda Copper Mining Company?

A. I believe he is the Chief Engineer.

Q. Does he function as Chief Engineer?

A. I believe he does; yes, sir.

Q. And has since 1944 when you first visited this shaft?     A. That's right.

Q. Has somebody been deputed by the Anaconda Copper Mining Company to go with you on your visits underground?

A. Yes, sir; Fred Strandberg. [185]

Q. Is he in the courtroom now?

A. Yes, sir.

Q. He is also Assistant to Mr. O'Kelly?

A. I believe he is an Assistant to Mr. O'Kelly.

Q. Whose machinery did you go down on?

A. On the cage operated by the Emma mine.

Q. The Emma mine is not an entity?

A. No.

Q. Who operates the cage; I mean the Company?

A. The Butte Copper and Zinc and Anaconda Copper Mining Company.

Q. Were you furnished maps by the two Companies here as to the underground workings of the Emma mine with reference to the cross-section going under the Ella Poague property?

A. No, I was furnished plan maps of the sills and stopes from which I built up cross-section maps.

Q. Those maps are here, the plan maps?

A. Some of them.

(Testimony of Edgar J. Strassberger.)

Q. Did you build up and make a composite map of the plan maps that were furnished you?

A. A composite map of the sill maps furnished me.

Q. It does not contain the stopes?

A. No, sir.

Q. Have you that composite map here in court?

A. It's on your desk.

Mr. Maury: We are going to offer this. Do you wish it further identified?

Mr. Dwyer: We would like to interrogate the witness on that. [186]

Mr. Maury: Then we will interrogate first. I didn't know whether you wanted to object or not.

Mr. Dwyer: We reserve the right also to interrogate.

Q. (By Mr. Maury): I show you 19. What is 19?

A. 19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit.

Q. Does Ella Poague's property appear in outline? A. It does.

Q. Whereabouts on that plan map?

A. Coordinate 4600 north runs through it. Also coordinate 5300 west runs through the property.

Q. And is it built up and composed by you from data, plans and maps furnished you by a Company at the request of the plaintiff's attorneys, Mr. Genzberger and myself? A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. And have you been present when such requests were made, or some of them?

A. Some of them. I have been present several times.

Q. And these plans would be furnished pursuant to those requests?      A. Yes, sir.

Q. And from that you have made this 19?

A. Yes, sir.

Q. And now tell what Exhibit 19 shows and what the different coloring on No. 19 means?

A. This map shows by the most simple explanation I can give you would be if the surface of the earth itself was like glass and you could look down in depth and the sill maps which would be represented like tunnels at [187] different levels, the first level would be 300 feet from the surface, the next level 100 feet, or approximately. As you go down like that you look down upon all those levels; they don't stand right under each other but one level goes more to the north than the next level, and looking down at all these levels they would give you a picture as you see on this composite map. The different colorings represent the different tunnels and different levels as you go down, and they are marked on the map from the 200 down to the 1600.

Q. Tell whether the vein of the Emma goes into the ground vertically, or on a slant or slope or dip?

A. It goes on a slope or dip from the vertical.

Q. About how much from the horizontal does it dip?

A. It dips various degrees at different places.

(Testimony of Edgar J. Strassberger.)

I would say you would find an average of 57 degrees dip in many places.

Q. And by dip what do you mean?

A. I mean that if you go down the shaft, say to a hundred feet depth,—or let's go down 200 feet and get to the tunnel that's marked 200, you would find a vein there. Then if you go down say to the 500 level you would find that same vein to the south several hundred feet. In other words, it dips like the roof of a building.

Q. Can you tell the jury what a vein is?

A. Yes, a vein is—it has characteristic features. It is composed of quartz and other minerals of varying width between what we call walls of a different material. The veins carry ore which in turn carry values in different metals, silver, gold and manganese. [188]

Q. What is meant by the strike of the vein?

A. The strike of the vein is along the course of the vein from one end to the other on a level.

Q. Through the country?

A. Through the country.

Q. As it appears at the outcrop?

A. Yes, it could be at the outcrop; it could be below, too.

Q. Are the different colors on this composite map marked with the numbers of the various levels which the colors represent? A. They are.

Mr. Maury: We offer it in evidence.

Mr. Finlen: No objection.

(Testimony of Edgar J. Strassberger.)

The Court: The exhibit will be admitted without objection.

(Plaintiff's Exhibit No. 19, a plan map prepared by the witness, was here offered and received in evidence. The same will be certified to the Circuit Court by the Clerk of the Court.)

Q. Mr. Strassberger, point out to the ladies and gentlemen of the jury where on 19 and on the surface Ella Poague's property is?

A. Well, upon the surface,—we are on the surface now and the Ella Poague property is shown by these pencil lines, these rectangular lines that I am tracing with my pointer.

Q. Who traced in these cross-lines on the map?

A. What do you mean by the cross-lines, coordinate lines?

Q. Yes, coordinate lines? [189]

A. They were printed originally on the paper.

Q. Has Mr. Strandberg done some of the work on this map as to some of the lines?

A. I notice some lines on there I didn't put on. I believe he placed on that map as he has on other maps the Ella Poague property. I checked it up.

Q. And it's correct?

A. It's correct, yes.

Q. Now, does this map exhibit all of the excavations in the area which it covers, or just some partially?      A. Just partial.

Q. Explain to the ladies and gentlemen of the jury why it is partial and what cannot or is not on the map?

(Testimony of Edgar J. Strassberger.)

A. Well, the simplest way to do that,—if this floor would be one of the levels, one of the colors, and the ceiling is another level, that's all that shows of this level and the level up above. However, other workings have been done on those levels what's called stopes. They have dug the ore from this level where the floor is along the dip of the vein up to the level above, and in the same way down from the surface as far as they have gone to the depth of the mine.

Q. And did you, on your examinations, find that stoping had taken place at places?

A. Pardon me, Mr. Maury. I may have mis-spoken myself by saying that from the surface. The nearest, the upper level to the surface that I have any knowledge of where operations was performed on an extensive scale would be 200 feet from the surface. In other words, 200 feet from the Collar of the Emma shaft; approximately [190] 200 feet.

Q. Did you find stoping had been done when you visited the mine in 1944 and at other times, from the 200 level down? A. Yes, sir.

Q. Describe in a general way how extensive that stoping was insofar as it concerns the Ella Poague property and the vertical under it?

A. It's been rather extensively stoped from one level to the other in a plane and in that plane I built a map to show the stoping on that dip that goes under the Ella Poague property.

Q. Have you that map here?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Mr. Maury: Will you mark this 20-A and 20-B. It's two sections of the same.

Q. Mr. Strassberger, tell the court and jury what 20-A and 20-B are?

A. I will try to as simple as I can. I have already explained what the sill maps are. If we just instead of going through all the 16 levels take 2 levels, one would be your ceiling and the other the floor. Now this map represents what you would see if you would cut the earth north and south and then getting out on the side and looking at the ends of these various levels or sills, and between the sills and on the dip you will see the stopes. You will note the stopes are where the ore and containing the metals were extracted. In other words, if you are on this level here you have a sill above and sill below us, and standing at the west end [191] of this room and looking where you cut the earth and say right at this point they were on the vein. They wished to take the ore out to the sill above. Well, that vein would show coming on a dip to that corner of the room down diagonally toward the floor; and when you stand over there to the west and look at the end of all these veins or stopes you would see a picture shown on this diagram.

Q. What is the general course through the country, or strike as you call it, of the Emma vein?

A. Northeasterly and southwesterly.

Q. I will ask you if any vein is exactly the same

(Testimony of Edgar J. Strassberger.)

on a strike or if that is just a general course or strike?

A. The course would be between any particular point. Sometimes we find a vein on the surface that goes quite a distance in the same direction and then at other times it will vary like the track of a snake.

Q. They are not straight affairs?

A. No, not entirely straight.

Q. Is this the north south section under the Poague property? A. That's right.

Mr. Maury: We offer it in evidence; plaintiff's exhibits 20-A and 20-B.

Mr. Finlen: No objection.

The Court: Very well, admitted in evidence without objection.

(Plaintiff's Exhibits No. 20-A and No. 20-B were here received in evidence. The same are maps underlying the Poague property. (Stope maps.) The same will be certified to the Circuit Court by the Clerk of this court.) [192]

Q. Mr. Strassberger, you know which is "A" and which is "B." Put "A" above "B," or whichever should go above.

A. Yes, sir. I wonder if I could explain one point about these maps?

Q. You wish to explain something about "A" and "B" of 20?

A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A.C.M. Company. Well, I

(Testimony of Edgar J. Strassberger.)

don't know exactly who printed the maps but they were delivered to me either personally by Mr. O'Kelly or Mr. Strandberg, or the attorney for the plaintiff.

Q. That was Mr. Genzberger or myself?

A. That's right.

Q. One or the other?      A. Yes, sir.

Q. Mr. Strassberger, in your visits underneath the surface of Ella Poague's property did you find any evidence of sinking or settlement of ground?

A. Yes, sir.

Q. Describe to the court and jury what you found in the way of sinking or settlement?

A. I found big mining timbers crushed.

Q. Big mining timbers. That means nothing to the ladies and gentlemen on the jury. Give some size.

A. A post in these sills, these tunnels, all the way from twelve to sixteen inches.

Q. In diameter?

A. In diameter. I would consider heavy timber put in [193] to support heavy and moving ground. These timbers I found in a great many places, including the timber on top of these posts which is called the caps, would be shoved out of line both laterally as you walk in and sideways; many of them cracked.

Mr. Finlen: If the Court please, we move to strike the answer as not responsive. It appears from the answer he indicated what he found in a great many places. The question was directed to what

(Testimony of Edgar J. Strassberger.)

he saw underground by way of sinking or settlement beneath the Poague property.

Mr. Maury: I will modify the question and in the immediate—— (interrupted).

Mr. Finlen: Just a minute. May we have a ruling on the motion with regard to the answer.

The Court: The motion will be denied. I can't assume from the testimony of the witness he is not talking about the area included or indicated by the question. The answer itself does indicate that so the motion will be denied.

Q. Mr. Strassberger, you may continue your description?

A. Would you frame another question?

Q. I will frame another question. Mr. Strassberger, have you noticed a change in the surface of the earth and escarpments in the region of the Poague property? A. Yes, sir.

Q. In your experience and knowledge and study as a Mining Engineer and in the studies of others does the excavation and the settlement caused by it always extend immediately above the excavation, or does your profession [194] know something that is called an area of draw? A. Both.

Q. Both above and in the area of draw?

A. Both. You are dealing with subsidence and asking a question regarding subsidence being vertically above the excavation or does it extend out of the bounds of vertical lines? A. Yes, sir.

A. And my answer, it does both. In other words,

(Testimony of Edgar J. Strassberger.)

the surface will sink vertically above the excavation and also areas outside of that vertical line.

Q. In the areas outside of the vertical, what is that sinking called?

A. We have a number of technical terms. In order to carry on a discussion of subsidence—but as simple as I can make it and using some of the terms the one you asked me about is called the angle of draw. In other words, if the excavation is square like that and from, say from this floor to the ceiling a vertical line would go straight up to the earth. When that ground starts to subside if you carry those lines straight up to the earth's surface that would be a vertical subsidence. However, study of this problem shows the cracks on the surface extend both sides of the vertical line.

Q. Both sides or all sides?

A. Well, you are bringing in a further condition. It extends as far laterally as the excavation is laterally. However, I wouldn't say there is any angle of draw in a lateral or along the strike of the vein, but a cross section angle of draw is along a plane like this vertical [195] section showing the ground has started to move both, in the case of Butte, both north and south of that particular excavation you have under consideration. In other words, if that excavation is a hundred feet wide north and south and you extend that to the surface you got a vertical subsidence one hundred feet wide. However, experiments and studies show that may extend north several hundred feet and south several

(Testimony of Edgar J. Strassberger.)

hundred feet, so the effects of that one excavation only one hundred feet long north and south underground may be several hundred feet in extent on the surface.

Q. Are there examples of that phenomena near the Ella Poague property and over the workings of the Emma mine and to the west?

A. I would say, yes.

Q. And have you observed this extension westerly as far as the corner of Gold and Jackson streets?

A. I have examined what I consider an apex of the Zaroma-Emma mine from the corner of Jackson and Gold Sts., northeasterly for close to a mile or half a mile. Say a half a mile.

Q. And is the area subject to the angle of draw increasing as the depth of the excavation?

A. Naturally.

Q. I mean does it, not naturally?

A. Yes, sir.

Q. That is a law of nature?

A. Yes, it's a physical effect of the excavations.

Q. Have you noticed the effects of the angle of draw to the west of this property on Montana street? [196] A. No.

Q. You have not?

A. I am probably not answering your question. Yes, I can see the effects of the angle of draw west of the Poague property and also east of the Poague property, and it extends south of the Poague prop-

(Testimony of Edgar J. Strassberger.)

erty several hundred feet and north of the Poague property a less number of feet.

Q. By a less number of feet, about how many feet to the north?

A. The apex that I just mentioned or that you asked me about striking from Gold and Jackson street?      A. Yes.

A. Runs across Dakota street approximately on the north boundary of its intersection with Silver Street. Now that would be about 500 feet north of the Ella Poague residence, and going south where we find an escarpment or a surface subsidence in front of what is known as the Llewelyn property—there is a picture of that—at a distance of about, well, I can measure it on the map. It's something over 500 feet; maybe seven or eight hundred feet south. From those two points from Silver street down to below Gold street or Platinum street. Half-way between Gold and Platinum street would be only area of draw at that particular point going down through the Ella Poague property, or say, the west line of Dakota street.

(Recess until 2 p.m. same date.)

Q. Mr. Strassberger, you were speaking of what is called the angle of draw as court adjourned.

A. Yes, sir. [197]

Q. Have you seen evidences in the immediate vicinity of the Poague property?

A. I have.

(Testimony of Edgar J. Strassberger.)

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial; not tending to prove or disprove any issue in this case.

The Court: Overruled.

Q. Describe some of those evidences?

A. Well, about to the north of the Poague property is an escarpment or a breaking of the surface of the ground crossing Dakota street at the north line of Silver and proceeds southwesterly and shows on the various streets going westerly to Gold and Jackson street.

Q. And about how far would that be, about two-fifths of a mile, may I ask?

Q. Well, it would be something like that; a half a mile I imagine.

Q. Are there excavations immediately under that escarpment?

A. You mean vertically?

Q. Yes.

A. No, I believe the most of the excavations are south of that escarpment. There may be a few north that I haven't examined.

Q. Have you seen where there has been a drawing over a wide angle there and not from the vertical at all? A. Yes, sir.

Q. And has that been noticed by other distinguished engineers?

Mr. Dwyer: Objected to as calling for a conclusion of [198] the witness.

The Court: Sustained.

Q. Mr. Strassberger, have you taken photographs of the conditions of the mine, the Emma

(Testimony of Edgar J. Strassberger.)

mine down the slope and close to the Poague property?

A. I have taken a number of photographs in the sills on north, east and west of the Poague property, surrounding the Poague property.

Q. And do like conditions prevail in the mine under the Poague property?      A. Oh, yes.

Q. You have walked back and forth down the vein under the Poague property?

A. Along the vein; yes, sir.

Q. Along the vein?

A. Along various openings.

Q. This morning you spoke of caps and posts having been put out of place and crushed?

A. Yes, sir.

Q. Is Exhibit 20 a picture of such conditions as you described in the Emma mine?

A. Yes, sir.

Q. And close to being under the Poague property?

A. It's in the Emma mine and I believe that's on the 600 sill; yes, that's on the 600 sill.

Q. And about how close to the Poague property, or being down the vein from the Poague property?

A. Well, it's in that area of subsidence. I can't tell without consulting the maps or records, but it's in that spot where I took the picture. It's in that area. [199]

Q. In the area of the Poague property?

A. Yes.

Mr. Maury: We offer it in evidence.

(Testimony of Edgar J. Strassberger.)

Mr. Dwyer: We object to the picture as incompetent, irrelevant and immaterial and doesn't tend to prove or disprove any issue in this case; not being located, the exact location to show whether it was a drift or cross-cut or stope, or what it was.

The Court: The objection is overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 21 here received in evidence, Exhibit is photo of a condition in Emma mine. The same will be certified by the Clerk of this Court to the Circuit Court.)

Q. Is this a photograph of a condition that you have found in the Emma mine and in the proximity of the Poague residence?

Mr. Dwyer: We object to the question as leading and suggestive. The witness should be shown the picture and let him tell what it is. Counsel is telling him what the picture is.

The Court: Sustained.

Mr. Maury: I was saving time and I will modify it.

Q. What is that a picture of?

A. That's a picture of the underground workings of the Emma mine on the 200 foot level about 100 feet I should judge west of the Emma shaft.

Mr. Maury: We offer it, Exhibit No. 22.

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; not tending to prove or disprove any issues in this case. [200]

The Court: The objection will be overruled and the exhibit will be admitted in evidence.

(Testimony of Edgar J. Strassberger.)

(Plaintiff's Exhibit No. 22 was here received in evidence. The exhibit is a photo of a condition in the Emma mine. The same will be certified to the Circuit Court by the Clerk of this Court.)

Mr. Dwyer: To save time on the objections, are those other pictures of the underground workings?

Mr. Maury: Elsewhere they are.

Mr. Dwyer: May the same objection go to the other pictures of the underground workings.

The Court: Yes, the same objection of counsel will go to the photographs of the underground workings of the Emma mine and the same ruling of the court will be considered, and defendant will be granted an exception in each instance and as to each ruling of the court.

Q. What is Exhibit 23?

A. Exhibit 23 is a sill floor on the 600 foot level showing conditions of subsidence in that area.

The Court: I doubt the propriety of showing the jury an exhibit not received in evidence.

Mr. Maury: I offered these and submitted them to counsel. I offer all four of them in evidence. They are Nos. 23, 24, 25 and 26.

The Court: Well, Exhibit No. 23 will be admitted at this time and the others will not be as there is no foundation laid as to the others. There is no testimony as to what they are. Exhibit No. 23 will be admitted.

(Plaintiff's Exhibit No. 23, photo of sill floor 600 foot level Emma mine here received

(Testimony of Edgar J. Strassberger.)

in evidence. The same will be certified by the Clerk of this court to the Circuit Court.)

Q. What is Exhibit No. 24? [201]

A. Exhibit No. 24 is also a picture of a sill floor showing a large cap broken and posts out of line. That's on the 600 sill and shows conditions of subsidence.

Mr. Maury: We offer it in evidence, Exhibit No. 24.

Mr. Dwyer: Same objection.

The Court: Objection overruled. The exhibit will be received in evidence.

(Plaintiff's Exhibit No. 24, a photo of sill floor 600 ft. level Emma mine here received in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

Q. Is the top designated on that?

A. Yes, sir.

Q. What is Exhibit No. 25?

A. Exhibit No. 25 is a picture of octagonal sets that are placed rather close together, solidly built, designed to withhold the ground in a subsidence area. That's on the 300 sill.

Mr. Maury: We offer it in evidence.

Q. Of the Emma mine?

A. Yes, sir; of the Emma mine.

Mr. Maury: We offer it in evidence.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 25, a photo of sets in Emma mine, 300 sill, here received in evi-

(Testimony of Edgar J. Strassberger.)

dence. The same will be certified by the Clerk of this court to the Circuit Court.)

Q. Have you seen the place where these octagonal sets are or were, recently?

A. Yes, sir; the 28th of March.

Q. Of this year?      A. Yes, sir. [202]

Q. And how does their condition now correspond with what was shown by this picture?

A. It shows a continuance of subsidence that has separated joints of those octagonal members and thrown a great many of the sets out of line and crushed part of the sets.

Q. About when was the picture taken?

A. This picture was originally taken in September, 1943.

Mr. Maury: We offer it in evidence, Exhibit No. 25.

Mr. Dwyer: Same objection.

The Court: It's been offered and received.

Q. What is Exhibit No. 26?

A. No. 26 shows a cave of the ground and on the 200 foot level a little west of the shaft. It may be a little south also, but it's close to the shaft and west of the shaft.

Mr. Maury: We offer it in evidence, Exhibit No. 26.

Mr. Dwyer: Same objection.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 26, a photo of cave of ground 200 ft. level Emma mine was here

(Testimony of Edgar J. Strassberger.)

received in evidence. The same will be certified to the Circuit Court by the Clerk of this court.)

Q. Mr. Strassberger, can you tell us whether the area of subsidence above an excavation is greater or less with an incline excavation than one nearly vertical?

Mr. Finlen: We object to that, if the court please, as calling for speculation and guess; it doesn't furnish sufficient fact upon which to predicate a conclusion.

The Court: Overruled. The witness is testifying as an expert as I understand it.

A. Where the excavation is vertical the reflection on [203] the surface is closer to the vertical line than if the excavation was on an incline. The incline would show a wider area across the excavation than a vertical excavation.

Q. Can you tell the jury the effect of opening such rock as encloses and is in the Emma vein of oxygen and water percolating through?

A. Well, they will cause a disintegration of the rock walls, soften them up, and will result in crumbling and sliding. It's one of the elements of subsidence.

Q. Can you tell the jury whether there is always some water running through the mines of Butte?

A. At places it's very wet and at some places not quite as wet, but there is generally water in the cracks and crevices.

(Testimony of Edgar J. Strassberger.)

Q. Where does that water come from?

A. Some comes from the surface and some from underground.

Q. Can you see evidence of water or see water in the Emma mine on the various levels?

A. Yes, sir.

Q. And is there ever in the mining there any evidence of excluding oxygen from the excavations?

A. Well, it would be pretty hard to exclude all the oxygen, but in cases of caving, in closing off the entrances the oxygen gets pretty rank and it would be dangerous to enter.

Q. What is the effect of blasting on the surface. I mean blasting underneath and in a vein?

A. Blasting sets up a vibration that can be heard and [204] at times felt on the surface.

Q. And what, if any, effect have those vibrations even outside of the rock actually fractured by the blast?      A. It tends to weaken them.

Q. What effect does a weakening and sinking of adjacent areas to a piece of land have on the area?

Q. Well, it makes it unstable; any place where the sinking occurs the ground adjacent to it is in an unstable condition.

Q. Having examined the adjacent areas as you say you have, the underground workings of the Emma mine, and also observed the settlement and subsidence of the residence and garage of Ella Poague, what in your opinion is the cause of that settlement of the garage and the residence?

(Testimony of Edgar J. Strassberger.)

A. I believe it's due to the underground workings in the Emma mine.

Q. What adjacent area does that movement show in?

A. Well, it shows west of the Poague property quite a distance, some distance beyond Washington street. That would be three or four blocks west and some distance beyond that; and to the east it shows, a block east of Dakota street is Colorado street.

Q. Yes.

A. And some big buildings there, a school building was razed on account of becoming damaged through subsidence.

Q. Is that east of the Poague property?

A. Yes, that's east and a little north, and some evidence further east than that; and south you find evidence three or four blocks south of the Poague property, and north; two blocks north.

Q. And throughout the entire area you have described you see evidence of settlement?

A. Yes, sir.

Q. And what in your opinion is the cause of it?

A. The underground workings in the Emma mine.

Q. Now you can tell the jury what the evidence is that you have seen in that area?

A. Well, I have seen cracks in the pavements, breaking up of the sidewalks, destruction of quite a number of buildings; I have noticed curb boxes

(Testimony of Edgar J. Strassberger.)

and water pipes sheared off; light poles leaning at quite an angle to the upright. That's all I can think of right now.

Q. What, if any, escarpments are there on Dakota street immediately south of Ella Poague's property; south of Silver street?

A. South of Silver?

Q. Yes?

A. Well, the most pronounced one crosses Dakota north of Mrs. Poague's on Porphyry street. There is a large one—well, the sidewalk south of Mrs. Poague on Dakota street; about a block south to Gold I believe is the next street. Then south of Gold street is a large escarpment that cuts across Dakota street and cut in under the Llewelyn property. It shows on both sides of Dakota St. where the sidewalk has made a very pronounced dip in there, probably a drop of a foot.

Q. Can you tell the court and jury if those escarpments are usually somewhat parallel to the strike of the Emma vein?

A. They are pretty general to the same strike.

Q. Mr. Strassberger, what effect on water-mains and water pipes when they are in service has subsidence of the earth around?

A. Well, they have the effect where the ground is moving like that to cause leaks, cause the joints to telescope or pull apart and to be thrown out of line.

Q. Have you seen that where it had actually happened to water pipes in that area?

A. Yes.

(Testimony of Edgar J. Strassberger.)

Q. And how close to escarpments?

A. Well, there was one on Idaho and Porphyry that the ground was open two consecutive times and the water rushed to the ground in quite heavy volumes. I have noticed a good many openings but paid no special attention to whether they were telescoped or pulled apart, but they occur very often in that district.

Q. Whereabouts do you live; where is your residence?

A. 303 South Idaho; right on the corner of Silver St.

Q. Now what effect does it have on gas mains that are in service?

A. Well, it would have the same effect on all mains, all pipes.

Q. Have you seen the results or a result of that effect somewhat south of Ella Poague's property on an early morning of February 22nd some years ago, or the 23rd?

A. In the neighborhood of?

Q. Placer? A. Placer?

Q. Yes, the corner of Placer and Platinum?

A. I recollect an explosion down there. [207]

Q. Did you see the gas mains exposed there that morning or the morning after?

A. Yes, I saw the Montana Power Company trucks and men working there.

Q. Did you look down into the ditch?

A. Why, yes, I did.

Q. Could you see what the effect had been. I

(Testimony of Edgar J. Strassberger.)  
don't mean on the adjacent property, I mean the effect on the gas main?

Mr. Dwyer: Objected to as incompetent, irrelevant and immaterial; it doesn't tend to prove any issue in the case.

The Court: I think that's asking for the effect of the explosion on the gas main. If that's the purpose I will sustain it.

Q. Was that in the region of subsidence?

Mr. Dwyer: We object to the question as incompetent, irrelevant and immaterial. The witness hasn't shown himself familiar with this particular locality or that he knows anything about what caused the break there; that he ever saw it before or afterward.

The Court: I will overrule the objection.

Mr. Dwyer: Exception.

Q. Was that in the region of subsidence?

A. As I recall that spot I examined a property known as the Nelson property that was subject to subsidence and if my recollection is correct this explosion we are talking about was within a short distance of the Nelson property.

Q. Immediately north? [208]

A. Yes, I believe just a little north.

Q. And does it adjoin, does the lot in front of which this explosion occurred adjoin the Nelson lot on the north?

A. That's my recollection. On Placer street.

Q. Mr. Strassberger, calling your attention to No. 19. Were all of the photographs taken within

(Testimony of Edgar J. Strassberger.)

the area, I mean all that have been admitted taken within the area shown on No. 19; all the underground photographs? A. Is this No. 19

Q. Yes?

A. Yes, sir; I believe they are.

Q. Point out to the jury the excavations that are under the parallelogram here and describe what the excavations are under the parallelogram known as the Poague property?

A. On the plan map the excavations that are vertically below the Poague property is a part of the 600 foot level and a portion of the 800 foot level, yellow and the pink.

Q. And on 20-B point out the portions that are directly under the Poague property?

A. The Poague property is represented in the yellow square on the surface. This dark line represents the surface and Porphyry street is north and Gold is south. You are asking me for the section of the underground mining vertically below that property?

Q. Yes.

A. This section map cuts the Poague property near the Dakota street line and exposes along that section this stoping area. We will put the letter "A" under Poague [209] and "B" and "B-2" and "A-2." The stoping area under the Poague property along this particular section shows at "C," "D," "E" and "F." That portion of a vein on that one section is represented by "C," "D,"

(Testimony of Edgar J. Strassberger.)

"E" and "F" and is vertically below the Poague property?

Q. Mr. Strassberger, directing your attention to No. 18, a picture of rock fractured just north of the Poague property. What course or strike has that fracture?

A. Well, I wouldn't call it a fracture.

Q. What would you call it?

A. It's more of a subsidence and the rock granite foundation under the fence has dropped and the sidewalk at that point has also dropped and exposed where they put the mortar in between the courses of the joints. That's washed out and left a space that looks like cracks.

Q. Is that a subsidence of part of that well?

A. I would consider it so.

Q. What is the strike of the subsidence there as regards the Poague property?

A. I don't think there is enough evidence at that point to give the strike, a subsidence strike.

Q. Where is the chimney of the Poague property with reference to that?

A. It would be southwesterly.

Q. And how far?

A. Oh, I would judge forty feet.

Q. And have you seen any evidence of subsidence in that chimney?

A. Yes, sir; it's settled.

Q. Mr. Strassberger, what have you to say as to whether [210] there is one system of mining depicted on No. 19, or more; or is it all one system of mining?

(Testimony of Edgar J. Strassberger.)

A. Which is No. 19, this one?

Q. No. 19 is the composite?

A. This one? Well, it's one system of mining; stoping at different veins or branches off from the veins—spurs.

Q. Through what shaft is all of the ore there extracted?

A. I believe most of it's extracted through the Emma shaft although there is a connection between these workings and the Travonia shaft that lies some distance to the southwest.

Q. About how far would the Travonia shaft be?

A. I would judge less than a mile.

Q. Would you say as much as three-quarters of a mile?

A. About, maybe. I never measured it.

Q. Is the Travonia shaft under the same management? A. I believe so.

Q. You have seen the same men in charge of both places?

A. I don't know what you mean by the men in charge. Mr. Strandberg accompanied me on all my examinations and that's as far as I considered who had charge.

#### Cross-Examination

By Mr. Finlen:

Q. Mr. Strassberger, is there any foundation under either of the porches at the Poague dwelling?

A. Did you finish your question? I don't believe I understood you, Mr. Finlen.

(Question repeated.)

(Testimony of Edgar J. Strassberger.)

A. I don't recall any foundation under the porches themselves. [211]

Q. I am referring now to the artificial foundation, of course, such as concrete or some other man placed?

A. I believe it's a four by four post but I am not certain.

Q. That would be under what porch?

A. The front porch.

Q. And what with reference to the back porch?

A. I think that is right down to the ground.

Q. Now the foundation of the dwelling itself excluding the porches is constructed of what?

A. Rubble masonry.

Q. Did you find any cracks in that foundation?

A. It's pretty hard to determine any cracks in the rubble masonry wall.

Q. Will you answer my question, please?

A. I can't say I found any cracks in the rubble walls.

Q. By the way, what is a rubble wall?

A. It's just chunks of granite or other rock laid in courses of mortar and built up into a wall.

Q. Mr. Strassberger, showing you plaintiff's Exhibit No. 18, what does that depict?

A. That depicts a rubble masonry wall under a fence.

Q. And that is not the Poague fence?

A. It's adjoining the Poague property on the north.

(Testimony of Edgar J. Strassberger.)

Q. In other words, it's the property other than the Poague property? A. Yes, sir.

Q. You were City Engineer of the City of Butte?

A. Yes, sir.

Q. When? [212]

A. I think it was 1920 and 1922 if I am not mistaken. 1920 to 1922.

Q. And as such City Engineer, or at least during that period, you consulted a plat showing certain elevations in the neighborhood of the Poague property?

A. Well, I can't say any special points. I had the general supervision over grading and laying of sidewalks and we had it in all sections down that way.

Q. Didn't you testify this morning, Mr. Strassberger, that during the period you were City Engineer you consulted a plat showing certain elevations in the Poague neighborhood?

A. That's true, I did.

Q. Did you also testify you verified certain of those elevations? A. That's true.

Q. What particular elevations did you verify at that time?

A. Now what time are you talking about?

Q. The time you were City Engineer of the City of Butte.

A. No, I don't think we got that straight. After I was City Engineer I ran levels in connection with the subsidence matter. Not when I was City Engineer, but subsequent to the time I was City Engi-

(Testimony of Edgar J. Strassberger.)

neer I ran a set of levels over a greater part of that subsidence area.

Q. Did you verify any elevations on any plat or map that showed an elevation that you consulted when you were City Engineer?

A. I used the same official elevations that were in evidence at the time I was City Engineer. They are [213] published in book form.

Q. At the time you were City Engineer did you verify any of those elevations which you used, and if so, state which?

A. I am not able to do that. We used the bench marks all the time. We had crews out.

Q. The bench marks you used, were any of them at the time you were City Engineer verified by you. That's a simple question?

A. Either by myself or the crews under me. I didn't run the instruments.

Q. Did you verify any elevations?

A. I don't recall.

Q. Did you testify this morning that elevations in the neighborhood of the Poague property have changed as determined by you since you were City Engineer? A. Yes, sir.

Q. What elevations?

A. Elevations of the block corners and alley corners.

Q. What block corner or what alley corner?

A. Most of the block corners and alley corners from Silver street south to Gold and from Montana street west to Colorado.

(Testimony of Edgar J. Strassberger.)

Q. Let's take a little larger area than that, Mr. Strassberger. Let's take the area between Main Street and Jackson and between Mercury and Gold?

A. Yes, sir.

Q. Have you verified any change in elevation in that area?

A. My present recollection of the area that I verified [214] elevations is between the limits I just testified to.

Q. I am directing your attention to the limits stated in my last question?

A. I would have to look up my records to determine that.

Q. The area bounded by Main street and Jackson street and Mercury street and Gold street?

A. I don't think I verified all of them, though.

Q. Did you verify any elevations in that area?

A. Yes, sir.

Q. Which one?

A. I would have to refer to my notes and plats.

Q. Where are your notes and plats?

A. Down in the office.

Q. In Butte? A. Yes.

Q. Are they available? A. Yes, sir.

Q. Will you bring them here after the recess this afternoon?

A. Yes, sir; if I can lay my hands on them that quick.

Q. In any event they are at your office and you can produce them from that office?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. Will you do that, please?

A. Yes, sir; I will be glad to.

Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butter Copper and Zinc Company. Is that true? [215]

A. I figured that was true when I testified.

Q. What caused you to figure it?

A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.

Q. Under lease from the Butte Copper and Zinc Co.?      A. That's my understanding.

Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?

A. No, that's outside of my jurisdiction.

Q. Why did you say you were lowered on a cage that was operated by the Butter Copper & Zinc?

A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.

Q. Then you don't know who operated the cage that lowered you?

A. No, certainly not; no, I don't.

Q. Did you testify this morning, Mr. Strassberger, that you were furnished maps, plan maps of sills and stopes by the two companies?

(Testimony of Edgar J. Strassberger.)

A. Yes, I did and I tried to correct that. I explained that the maps were made by either one or both companies, I don't know who; but they were furnished me by Mr. O'Kelly, some by Mr. Strandberg, and some of the other maps were delivered to Mr. Genzberger and he delivered them to me and I presume they were made by either or both of those two companies. [216]

Q. What caused you to presume they may have been made by the Butte Copper & Zinc?

A. Well, only that it seems to be common knowledge that's the Butte Copper & Zinc and being operated by the Anaconda Copper Mining Company.

Q. And from that you concluded the Butte Copper & Zinc prepared the maps?

A. I concluded that either one did it. I don't know which did it. I wasn't present when the maps were made.

Q. You know the employer of Mr. William O'Kelly don't you?

A. The Anaconda Copper Mining Company.

Q. You know the capacity he is employed by that Company?

A. I think Chief Engineer.

Q. You know the employer of Mr. Strandberg?

A. The same company.

Q. In what capacity?

A. I believe he is principal assistant to Mr. O'Kelly although I don't know; I assume that.

Q. You certainly don't have any knowledge or information or ground to suspect they are employed by the Butte Copper & Zinc?

(Testimony of Edgar J. Strassberger.)

A. I don't know, Mr. Finlen.

Q. Directing your attention, Mr. Strassberger, to plaintiff's exhibits No. 20-A and 20-B which are pinned on the blackboard. Are they drawn to scale?

A. Yes, sir.

Q. Is the horizontal the same scale which was used to determine or to depict the vertical? [217]

A. Fifty foot to the inch.

Q. They depict among other things the underground excavations beneath the Poague property?

A. Yes, sir.

Q. And you visited such excavations. Is that correct?

A. Well, I have walked through most of those sills where the ground was open for inspection. Many places they were blocked off and I couldn't enter.

Q. I am asking you whether or not you visited any area underground vertically beneath the Poague property?

A. Well, I would have to refer to all my maps showing what particular sill level I could go through and what I couldn't go through before I could answer such a question.

Q. You didn't have to refer to any such map when you answered Mr. Maury's questions?

A. I think I testified it was in that area.

Q. Didn't you testify you were under the building? Didn't you testify?

A. Pardon me, Mr. Finlen. I testified as I under-

(Testimony of Edgar J. Strassberger.)

stood the question to point out what workings were vertically under the Poague property. To answer your question I would have to consult my records to see if I was able to walk directly under the building or had I just the map showing the condition.

Q. In other words, at this time you don't know whether you were ever in an excavation vertically beneath the Poague property?

A. I think that's the way I stated.

Q. Didn't you testify this morning you had walked along the vein under the Poague property?

A. Well, there is a question there whether it's vertically below or diagonally below. I been several hundred feet below.

Q. Diagonally below would be under the Poague property. As an Engineer wouldn't you say that would be under the property?

A. I believe you would.

Q. Diagonally below?

A. Yes, a lower elevation.

Q. Where is the nearest underground excavation vertically below the Poague property that you know of?

A. I just testified it was the six and eight, I believe, hundred sill.

Q. How far is that from the surface of the Poague property, Mr. Strassberger, for the benefit of the jury? A. Practically 600 feet.

Q. In other words, there is so far as you know 600 feet of unexcavated area between the area you

(Testimony of Edgar J. Strassberger.)

have just mentioned and the surface of the Poague property?

A. 600 feet of vertical area, yes.

Q. What is the composition of the material in that intervening space, Mr. Strassberger?

A. I imagine it's granite. I was unable or never able to see it vertically above, but it's a granite formation.

Q. Mr. Strassberger, concerning plaintiff's exhibits 21 to 26 there was one you testified to on direct examination as having disclosed an area of subsidence at the time of the photograph which has changed considerably for the worse since the picture was taken. Will you identify it?

A. That was the octagonal sets on the 300. [219]

Q. And the area as shown in plaintiff's Exhibit No. 14?      A. That's correct.

Q. And that photograph was taken when?

A. I think in 1943.

Q. I think it's 21 to 26?

A. This is Exhibit No. 14. Is that right?

Mr. Maury: That's an exhibit with another marking.

Mr. Genzberger: No. 25 I think you will find it.

Mr. Finlen: Plaintiff's Exhibit No. 25. Plaintiff's Exhibit 25 is the marking in this case.

Mr. Maury: That's right.

A. That was taken—well, that must have been taken in 1943 or 1944 because it was in splendid shape.

Mr. Maury: Just a moment. It was taken in

(Testimony of Edgar J. Strassberger.)

1943 or 1944 and I don't think Mr. Finlen or ourselves either care for you to go any further with that answer.

Q. (By Mr. Finlen): When, subsequently, did you visit that area?

A. I believe in 1945 during the Ammerman trial.

Q. In 1945? At any other time subsequently?

A. In 1946. The last, the 28th of March in 1947.

Q. And the area depicted is on what level or what sill?

A. The 300 I believe. Let me look at that picture again. The 300 sill yes, sir.

Q. And the area has changed or did change substantially between the time of the taking of the picture and the time of your subsequent visit?

A. Yes, sir.

Q. Who accompanied you, Mr. Strassberger, at the time [220] that picture was taken?

A. I think Mr. Spiegel and Mr. Strandberg.

Q. And who accompanied you the time you made your subsequent visits to the area depicted?

A. Mr. Strandberg.

Q. You testified, Mr. Strassberger, that subsidence of the earth causes leaks, telescoping, and water and gas pipes to be thrown out of line in the area of the Poague property?

A. That would be the result of movement of the ground; yes, sir.

Q. You mean by that that such subsidence could account for such leaks or cause such leaks, or do you mean that it did?

(Testimony of Edgar J. Strassberger.)

A. I mean that a greater majority of those leaks were caused by subsidence. Some probably could be old pipe.

Q. The greater majority of what leaks?

A. The leaks to the water pipe in that district.

Q. You mean all of them or only the ones you specifically testified as having observed?

A. Well, just from general knowledge and ground moving I would say a large percentage of it was due to ground movement.

Q. Did you visit or see all the leaks?

A. I seen a good many of them.

Q. Answer my question, please?

A. Probably not; not all of them. I think there was 136 in a certain area there. I didn't observe all of them.

Q. Are you talking about Mr. Plummer's testimony? A. Yes, sir. [221]

Q. Are you familiar with the leak on Placer south of Platinum? A. No.

Q. Concerning which Mr. Plummer testified giving the date of January 29th, 1940?

A. No, sir.

Q. Do you know the cause of that leak?

A. No.

Q. The same question with reference to the leak reported February 12th, 1940, on the Platinum street intersection on Idaho?

A. Platinum and Idaho? I don't recall that; what date was that?

Q. February 12th, 1940.

(Testimony of Edgar J. Strassberger.)

A. No. I wouldn't be able to recall anything prior to 1944.

Q. 1944? But you do recall leaks in 1944?

A. I never kept any special record of that. I can't testify offhand to a particular date or condition of the pipes.

Q. But you testified here that all of those leaks with the exception of the first two that I specifically mentioned were caused by subsidence?

Mr. Maury: We object as that is not the witness' testimony.

Mr. Finlen: I am asking him if it didn't.

Mr. Maury: No, you are saying he did. We object to that and that is an unfair statement in the presence of the jury, impropoer cross-examination; and assuming something the witness has not testified to at all. The [222] witness said that subsidence has caused telescoping and pulling and settling, and leaks in water mains when in service; and he did not name any particular leak and your statement is an unfair statement of the record.

Mr. Finlen: I submit the record; it is not in the least unfair.

Mr. Maury: We will submit the record.

The Court: As I recall it the witness testified—he gave his opinion as to the effect the subsidence on the ground would have on water pipes and gas pipes. He further testified that he knew of some instances of leaks and further testified as I recall that in his opinion the great majority of the leaks that has been testified to by Mr. Plummer were

(Testimony of Edgar J. Strassberger.)

caused by the subsidence of the ground. However, ladies and gentlemen, that's my recollection of the testimony but, of course, you are the judges as to what the testimony is and you have your own recollection of it and if you have any different recollection of the testimony than that I have just given as my recollection of course it's your duty to follow your own recollection of the testimony. Proceed.

Q. Now, Mr. Strassberger, you said you wouldn't have any knowledge of leaks prior to 1944. Is that correct?

A. That's correct unless there was some specific time I was there and made some note of it. I can't recall any definite dates; it's too hard; it's too distant.

Q. You lived in that neighborhood for how long?

A. Longer than that.

Q. Well, can you recall any leaks in 1944?

A. If I would specify any particular leak on any [223] particular date I would be guessing, but I can specify positions and see where the men were working and if you want me to take the time I will compile a list I did see and the dates I saw.

Q. I will ask you this question, Mr. Strassberger. Did you examine any leaking or leaky or otherwise damaged water or gas pipes prior to November, 1945, in the so-called subsidence area?

A. Yes, I observed them but I couldn't tell you definitely which one without looking up my records.

Q. But you have examined some pipes?

(Testimony of Edgar J. Strassberger.)

A. I have examined diggings where the Water Company has had pumps pumping out the water and I have visited positions where the water flooded through the excavations and down the street.

Q. Did you examine the pipe? A. No, sir.

Q. You never had any cause?

A. No, I never got down into the ditch.

Q. Then you didn't examine the leak if you didn't examine the pipe?

A. I could see the leaks.

Q. In the pipes?

A. Presumed to come from the pipes.

Q. I am asking you whether or not you know, not what you presume?

A. Well, am I permitted to give a particular instance to answer the question?

Q. I am asking you just for any particular instance prior to November, 1945, where you examined the underground [224] pipe at the site of any leak, and I am directing your attention to either gas pipes or water pipes?

A. I believe I can. I believe at the corner of Porphyry and Dakota which is just north of Mrs. Poague the Water Company had the ditch opened and a good sized pipe,—I don't remember the diameter, maybe ten inches,—and they had a piece of pipe cut about two feet long that they were replacing a broken joint or something of that nature.

Q. Replacing a broken joint or something of that nature?

(Testimony of Edgar J. Strassberger.)

A. Yes, sir; there was a leak there.

Q. Did you examine the leaky pipe?

A. No, I didn't. I looked at it.

Q. I am asking you, Mr. Strassberger if you can give any instance where you examined the pipe prior to November of 1945 where there was a leak and which pipe was either a gas or a water pipe?

A. Well I can't say I examined the pipe. I saw it but I didn't make an special examination of it. I probably don't understand your question. Do you mean to see whether it was split or worn out or twisted?

Q. Yes, to observe the condition there?

A. I never made any close examination of any pipe.

Q. To tell whether it was worn out?

A. No, I believe a certain number was worn out and certain ones twisted.

Q. Which ones do you believe were twisted?

A. The ones subjected to ground movement.

Q. Which ones were subjected to ground movement?

A. All of them in the subsidence area are subjected to [225] ground movement.

Q. All right then, let's start in 1944, Mr. Strassberger. That's as far back as your knowledge goes?

A. I have no way of coupling up the dates unless I go through my records.

Q. Where do you have your records?

A. I may have some of them here. It will be

(Testimony of Edgar J. Strassberger.)

kind of hard. There are several thousand of those records I have taken over a period of some four years.

Q. Mr. Strassberger, while you are looking will you just answer one question and maybe we will be able to shorten it considerable. Isn't it your position that you believe that subsidence could cause leaks in pipes, in underground pipes?

A. Both could and did.

Q. That's where we differ. We want to find out where it did?

A. I will tell you one place where it did.

Q. Get your records.

A. I can remember that one.

Q. So you can clarify my information.

Mr. Maury: Answer the question as to one place.

The Court: There hasn't been any question put him. Counsel hasn't put the question.

A. Well, I got several thousand records here and it's going to take some time to compile that but I can do it.

Mr. Genzberger: You don't have to get but one.

A. Yes, but they are scattered around.

The Court: If counsel seems to think it's necessary.

Mr. Maury: May I refresh his memory, Mr. Finlen, as [226] to one date?

The Court: I don't think so, Mr. Maury. Mr. Finlen has the witness under examination and we will permit him to go ahead, and if it takes time we will simply have to take time.

(Testimony of Edgar J. Strassberger.)

Mr. Finlen: I don't wish to take any more time than anybody else does, Your Honor, but I believe it's necessary.

The Court: I think, ladies and gentlemen, Mr. Strassberger can examine those records just as well without our presence so we will take a recess for twenty minutes to permit him to gather what data you can.

(Recess for 20 minutes.)

The Court: Proceed.

Q. (By Mr. Finlen): Mr. Strassberger, I believe you testified that in your opinion the majority of the water pipe and gas pipe disturbances testified to by the witnesses Plummer and Doran were caused by subsidence. Is that correct?

A. I didn't hear Mr. Doran's testimony, but the water pipes I heard I believe that the majority of those leaks were caused by subsidence. That's right.

Q. Directing your attention to the water pipe leaks what is your opinion regarding the leak reported on January 15th, 1944, on Idaho street south of Platinum?

A. I observed a leak there. The Water Company excavated a trench and the water came up to the surface and ran all over the street, a regular stream of water for quite a little while, an hour or so; I just saw it going down and that was close to the west line of Idaho. Sometime [227] later there was another break just——(interrupted).

Q. Just a minute. Confine your remarks to this one.      A. I don't know by dates.

(Testimony of Edgar J. Strassberger.)

Q. And did you observe the pipe at that time?

A. I couldn't see the pipe; the trench was full of water.

Q. You don't know the nature of the leak then?

A. No.

Q. Do you know the nature of the repair?

A. No, I didn't stay there to watch them repair it.

Q. Do you know what was leaking?

A. Water.

Q. From what? A. From a main.

Q. Do you know the nature of the leak?

A. No.

Q. Do you purport to know the cause then?

A. It was right at where the escarpment, where the Zaroma Lode crosses Porphyry street at Idaho.

Q. Will you answer my question, please?

A. It was the ground movement in my opinion.

Q. Describe what happened with reference to whether the pipe was merely worn and leaking or had been pulled or telescoped?

A. That particular place was covered with water and I couldn't see it.

Q. You don't know whether it was caused from a hole in the pipe caused by corrosion or not?

A. No, I don't.

Q. If it was due to a hole in the pipe caused by corrosion [228] would you say that was due to ground movement?

A. I would call that electrolysis.

(Testimony of Edgar J. Strassberger.)

Q. Would electrolysis causing a leak in the pipe be due to ground movement?

A. No, electrolysis wouldn't necessarily have anything to do with ground movement.

Q. Then you don't know the cause of this particular leak do you Mr. Strassberger?

A. Not from actually examining the pipe but from the position of the pipe and ground movement I would attribute it to ground movement.

Q. What was the position of the pipe to any other object?      A. Any other object?

Q. Yes?

A. It was just off from the north curbline on Porphyry street.

Q. Did you see the pipe?

A. No, I didn't see the pipe.

Q. How do you know the position of the pipe?

A. I don't know the position of the pipe.

Q. You don't know the cause of the leak do you?

A. Only from what I testified.

Q. Well do you know the cause?

The Court: I think he said on a number of occasions he doesn't. That his opinion was it was caused by ground movement.

Mr. Finlen: He also testified that it may have been caused by electrolysis which wouldn't necessarily be due to ground movement. [229]

The Court: He said if it was electrolysis ground movement would have nothing to do with it, but he said he didn't see the pipe and doesn't know the nature of the pipe or the leak.

(Testimony of Edgar J. Strassberger.)

Q. You don't know whether the cause of that leak was electrolysis or some other cause?

A. I don't know whether it was electrolysis, but I believe it was ground movement.

Q. Why do you believe it was ground movement?

A. Because there is considerable movement at that place.

Q. You didn't see the pipe and don't know anything concerning the nature of the leak?

A. Just from general observation and knowledge of the district and what happens with pipes in the subsidence zone. That's more likely to be due to subsidence than further away because it's right at the escarpment right where the ground splits and drops.

Q. I am not asking you what is the possible cause or what is likely, I am asking you what is the cause of that leak?

The Court: He said no. He said in his opinion it was caused by ground movement. In other words, he is testifying about a matter of opinion and not to a matter of fact.

Q. With regard to the leak reported on February 10th, 1944, on Porphyry street west of Colorado?

Mr. Genzberger: Mr. Finlan, what was the previous one you asked him about?

Mr. Finlan: The previous one was on January 15, 1944. [230]

Mr. Genzberger: I think he was testifying to one a block and one-half north of that place.

The Court: The witness is giving his testimony.

(Testimony of Edgar J. Strassberger.)

Mr. Genzberger: A misunderstanding between the places.

The Court: The witness hasn't said so and neither has other counsel, so we will just pass that.

Q. Are you familiar with that leak?

A. No, I can't recall it at the present time.

Q. And the leak reported on March 1st, 1944, at Placer street south of Platinum. Are you familiar with that leak?

A. Placer south of Platinum. I can't recall it.

Q. And the leak reported on Idaho north of Platinum?

A. I believe that's one repaired by Mr. Sundberg the plumber.

Q. What was the nature of the leak if you observed it?

A. I have to give the same answer there as to all the others. I didn't get down and look at the leak.

Q. You didn't see the pipe?

A. I don't believe I saw the pipe, no.

Q. Are you familiar with the leak reported on April 14th, 1944, on Main street north of Aluminum?      A. No.

Q. The leak reported on April 28th, 1944, Placer street north of Aluminum?

A. Placer street? I seen some repair work going on there but I can't tell you anything definite about it.

Q. You don't know what was wrong with the pipe that caused the leak?

(Testimony of Edgar J. Strassberger.)

A. I just saw them repairing it. [231]

Q. Are you familiar with the leak reported July 30th, 1944, on Colorado and Porphyry street?

A. Colorado and Porphyry. No, that's in the subsidence zone but I don't remember that particular opening.

Q. Are you familiar with the leak reported September 28th, 1944, on Main street north of Silver?

A. No, I don't believe I saw that one.

Q. And the leak reported December 8th, 1944, on Montana street north of Porphyry?

A. There is several times I observed them repairing the pipes there. That's between Porphyry and Silver.

Q. Did you observe a repair being made there on December 18th, 1944?

A. There could have but I can't remember about the date. I have seen them repair pipes there.

Q. But you don't recall having observed the repair of a pipe at that location on that date?

A. No, only that I saw them working; that's all.

Q. Are you familiar with the leak reported on January 17th, 1945, on Montana street south of Silver? A. Montana street south of what?

Q. Silver?

A. Well that's the same location. Yes, I seen them working in there; several trucks and a compressor.

Q. Did you see the pipe?

Q. Then you don't know the nature of the leak?

A. No, sir.

A. I don't recall the pipe.

(Testimony of Edgar J. Strassberger.)

Q. And the leak reported on January 27th, 1945, on Dakota street north of Aluminum. Are you familiar with [232] that leak?

A. Not of the leak itself, no.

Q. And a leak reported February 3rd, 1945, on Placer street north of Aluminum?

A. I didn't get your street.

Q. Placer street north of Aluminum?

A. Placer street north of Aluminum. Yes, I saw them working in there. That's not far from that explosion we talked about a minute ago. I saw them working there.

Q. Did you see the pipe?      A. No.

Q. Are you familiar with the nature of the leak?

A. No.

Q. Are you familiar with the leak on February 9, 1945, on Colorado street south of Gold?

A. No, not specifically.

Q. Are you familiar with the leak on February 10th, 1945, on Montana street north of Aluminum?

A. Yes.

Q. Did you see the pipe?

A. I saw them working there for several days. It was quite an excavation but I did not see the pipe.

Q. Then you don't know the nature of the leak of the pipe?

A. No, I can't tell you the nature of the leak.

Q. Are you familiar with the leak on February 17th, 1945, on Dakota street north of Aluminum?

A. I don't recall that one.

(Testimony of Edgar J. Strassberger.)

Q. Are you familiar with the leak reported on February 24th, 1945, on Colorado street south of Platinum? [233] A. I don't recall it.

Q. Are you familiar with the leak on March 20th, 1945, Montana street south of Platinum?

A. That was another time at the same place I just spoke of.

Q. Did you see the pipe?

A. I didn't see the pipe.

Q. I take it then you don't know the nature of the leak; only it was a leak?

A. What do you mean by the nature of the leak?

Q. Well, the pipe was leaking because it had a hole in it, or some other cause?

A. I presume if it had a hole in it it would leak.

Q. Well, what I mean, Mr. Strassberger, a hole other than the hole manufactured in the pipe at the joint?

A. I understand that. I mean the same thing. There wouldn't be a leak unless there was a hole in it or a crack or the joint pulling.

Q. Was it pulled apart? A. I don't know.

Q. You don't know whether it was pushed together or telescoped?

A. No, I don't know whether the ground was shoving down or pulling.

Mr. Finlen: We ask the answer be stricken as not responsive to the question.

Mr. Genzberger: We resist the motion.

The Court: The motion is granted.

Q. You don't know anything about the position

(Testimony of Edgar J. Strassberger.)

of one length of the pipe with reference to the other? [234]      A. I didn't see it.

Q. Are you familiar with the leak March 28th, 1945, on Dakota street south of Porphyry?

A. I don't remember that.

Q. Or the leak on March 28th, 1945 on Porphyry west of Idaho.

A. That's probably the second one I tried to tell you about a little while ago where the water ran down the street so heavily.

Q. Did you see the pipe?

A. No, I couldn't see the pipe. The ditch was full of water.

Q. The leak reported on April 9th, 1945, on Aluminum street east of Montana, are you familiar with that?

A. I know the district and I know they were working in there but I can't give you any information as to the nature of the leak.

Q. And the same with reference to the leak of April 9, 1945, on Placer north of Aluminum?

A. I have seen them work there, that's all.

Q. You didn't see the pipe?      A. No.

Q. And what with reference to the leak on April 16th, 1945, on Idaho south of Platinum?

A. Just that I recall them working there.

Q. You don't know what they were working on?

A. Working on a pipe.

Q. Did you see the pipe?

A. I don't recall of seeing the pipe at that point.

(Testimony of Edgar J. Strassberger.)

Q. June 30th, 1945, on Porphyry street west of Dakota? [235] A. What date was that?

Q. June 30th, 1945?

A. I don't recall the particular.

Q. July 27th, 1945, Colorado south of Gold?

A. I don't recall that one.

Q. August 9th, 1945, Idaho north of Gold?

A. I remember of some work, repair work going on there.

Q. Did you see the pipe? A. No.

Q. On August 29th, 1945, Platinum west of Montana?

A. Platinum west of Montana? I don't remember it.

Q. August 30th, 1945, Idaho north of Platinum?

A. I believe I got something on that. No, I don't remember that.

Q. September 7th, 1945?

A. Just a moment. On April 30th, 1945.

Q. I directed your attention to August 30th, 1945.

A. No. I have one on April 30th, 1945. I don't remember that one either.

Q. On September 7th, 1945, in front of 626 South Montana street?

A. I can't tell you anything about it.

Q. September 9th, 1945 on Porphyry street at the intersection with Idaho?

A. That's the same spot where they had been opened three or four times. I never saw the pipe.

Q. On September 16th, 1945, Placer street south of Platinum?

(Testimony of Edgar J. Strassberger.)

A. No, I can't recall that.

Q. October 5th, 1945, Dakota south of Mercury?

A. I don't remember it.

Q. October 9th, 1945, Dakota south of Porphyry?

A. No, I don't recall that particular incident.

Q. November 8th, 1945, Aluminum east of Montana?

A. Yes, that's close to Placer street. I saw them working there.

Q. Did you see the pipe?

A. No, sir; I didn't.

Q. Do you know anything about the nature of the leak?      A. No.

Q. November 9th, 1945, Platinum street at the intersection of Idaho?

A. No, I don't remember that one.

Q. November 10th, 1945, Platinum at the intersection of Idaho?

A. No, I don't recall that one.

Q. November 15th, 1945, Platinum east of Idaho?      A. No.

Q. November 16th, 1945, Dakota north of Aluminum?      A. No, I don't remember it.

Q. November 26th, 1945, Colorado south of Porphyry?

A. No, I don't remember that one either.

Q. December 8th, 1945, Montana north of Porphyry?

A. Well, there has been several in there.

Q. Do you remember that particularly?

(Testimony of Edgar J. Strassberger.)

A. Well, only in a general way; they were repairing broken pipes in there.

Q. Did you see the pipe?

A. I didn't see the pipe, no.

Q. How do you know they were repairing broken pipes, Mr. [237] Strassberger?

A. Well, the repair crew was there working and had the ground torn up and had material there that indicated that they were repairing the pipe.

Q. Indicated they were equipped to repair the pipe, is that right?

A. They were equipped, yes.

Q. What about the leak January 21st, 1946, Platinum west of Montana?

A. That's close as I recall the repair work made by Perry the plumber in which he explained to me that——(interrupted).

Q. Which he what? A. Explained.

Q. We don't care for his hearsay, Mr. Strassberger. Did you see the leak or were you familiar with it or know anything about it of your own knowledge? A. What's the date?

Q. January 21st, 1946? A. No.

Q. January 21st, 1946, on Main street at the intersection of Platinum? A. No.

Q. February 3rd, 1946, on Montana north of Aluminum?

A. Well, that's the same location. I have seen them work there several times.

Q. On April 8th, 1946, Placer north of Aluminum? A. Where? [238]

Q. You never saw the pipe? A. No, sir.

(Testimony of Edgar J. Strassberger.)

A. Placer north of Aluminum street?

A. I don't recall that particular one. There was some work done there but I don't know the dates.

Q. May 26th, 1946, on Platinum at the intersection of Colorado?

A. No, I don't recall that one.

Q. April 5th, 1946, Platinum west of Montana?

A. No, I don't remember that one.

Q. October 9th, 1946, Dakota north of Aluminum?

A. There may have been one there but I don't recall it.

Q. November 2nd, 1946, Montana and Aluminum?

A. That's the same location where they been doing a good deal of work there repairing.

Q. Do you recall that particularly?

A. No, I don't.

Q. November 3rd, 1946, Main and Platinum?

A. No.

Q. Idaho north of Gold on December 7th, 1946?

A. I recall them working there but I didn't see the pipe.

Q. Do you know they were working on pipe?

A. Well, they were opening a ditch there and my recollection it was the Water Company.

Q. They might have been taking a valve off for all you know?      A. They might have been.

Q. The leak on January 8th, 1947, Placer north of Aluminum?      A. No, I don't remember it.

Q. January 9th, 1947, Colorado south of Platinum? [239]      A. I don't recall it.

(Testimony of Edgar J. Strassberger.)

Q. January 25th, 1947, Dakota north of Aluminum? A. I don't recall it.

Q. February 6th, 1947, Montana north of Aluminum?

A. Well, that's down that same district I seen them working several times. They had quite an excavation down there.

Q. You don't know what the nature of the work was? A. No.

Q. March 12th, 1947, Dakota north of Aluminum? A. I don't remember that one.

Q. Now, referring to gas leaks, Mr. Strassberger, were you familiar with any gas leaks prior to 1944?

A. Not that I can specifically recall. I may have some notes of it in my records but I can't recall any at this time.

Q. Would it help you if I would cite the specific instances, locations and dates prior to 1944?

A. Well, if it's a question that requires a personal examination of the pipe itself to determine the kind of a leak I wouldn't be able to qualify.

Q. Well, would it require merely observation of the pipe? A. What's that?

Q. Merely observation of the pipe. Did you observe any gas pipe prior to 1944?

A. If I knew the date of when I testified to that explosion I could; I probably could.

Q. We will come to that later then, Mr. Strassberger. A. I think I got it right here. [240]

Q. With the exclusion of the Placer street leak concerning which you testified are you familiar with

(Testimony of Edgar J. Strassberger.)

any leaks that occurred prior to 1944, excepting that one for the moment?

A. No, I never paid any special attention to the leaks. There had been several explosions but outside of ordinary leaks I paid no attention to it.

Q. Are you familiar with the gas leak on February 22nd, 1944, at Platinum and Dakota?

A. No, I don't remember it.

Mr. Maury: Did you say February 22nd?

Mr. Finlen: February 22nd, 1944, testified to by Mr. Doran.

Mr. Maury: It wasn't Platinum?

Mr. Finlen: Platinum and Dakota.

A. 112 West Platinum.

Q. That is Platinum and Dakota street?

A. Well, that's pretty close to it.

Q. This was 112 West Platinum street?

A. That's right, 112 West Platinum. There was an explosion there and I examined the pipes and saw them underground and saw them working there; the Montana Power Company was working there and repairing that gas pipe.

Q. What was the nature of the—describe the pipe repairs?

A. Well, I can't do that. There were men working on the repairs very frantically and they had the gas turned off when I happened to be there with Mr. Maury, and we both looked down and saw the pipe; but the extent of damage I can't tell you what it was. [241]

Q. Would you tell the nature of the damage to the pipe?

(Testimony of Edgar J. Strassberger.)

A. Well, it was a leaky pipe; it was leaking gas.

Q. Leaking gas at the point or through a hole in the pipe?

A. I can't tell you that. I wasn't a repair man and didn't do any repair on it and didn't stay there long enough.

Q. Did you stay there long enough to see if it was leaking at the joint or elsewhere?

A. No, sir; I didn't.

Q. Do you know what the size of the pipe was?

A. It looked to me about a four or six inch pipe. I couldn't swear exactly; in the neighborhood of a six inch pipe.

Q. In any event that's the leak at 112 West Platinum? A. Yes, sir.

Q. Are you familiar with the gas leak on January 17, 1947, reported at 413-415 South Montana?

A. No, sir.

Q. And the leak on December 20th, 1944, at 316 South Idaho? A. 316. At what date?

Q. December 20th, 1944?

A. No, I don't remember that.

Q. And the leak on June 9th, 1945, at 220 West Mercury? A. No, I paid no attention to that.

Q. Now you testified specifically in answer to Mr. Maury's questions regarding the leak at Idaho and Porphyry?

A. The leak at Idaho and Porphyry; yes, sir.

Q. When did you observe that leak?

A. I can't give you the date.

(Testimony of Edgar J. Strassberger.)

Q. Was it a water leak? A. Yes.

Q. What year?

A. Well, it happened two or there times there within the last two years.

Q. Did you see the pipe?

A. The ditch was full of water; I couldn't see it. The ground was all full of water and was flooded running down Porphyry and then down Idaho street.

Q. You don't know the nature of the leak then?

A. No.

Q. You also testified in answer to Mr. Maury's interrogation regarding a gas leak on Placer street near the Nelson property?

A. I testified it was close to the subsidence north of Nelson's property.

Q. I believe the adjoining property you said?

A. I think so. I think the explosion was adjoining to the north.

Q. What was the nature of that leak?

A. That explosion?

Q. No, the leak in the pipe?

A. I just testified we saw them working on it and I don't know the nature of the opening, whether it was a hole through the pipe or what it was; or a crack in the pipe.

Q. Was the condition of the pipe you saw being repaired due to the explosion? [243]

A. I don't think so. I think the explosion was due to the leaking of the pipe.

Q. Describe the pipe?

(Testimony of Edgar J. Strassberger.)

A. Well, I paid no special attention. I said a minute ago I thought around four or six inch but I am not certain. I didn't measure it.

Q. Do you know where the leak was; whether at the joint or elsewhere?

A. No, I didn't pay any attention to that.

Q. You don't know whether it was caused from a hole in the pipe or pulling apart of the pipe from the joint? A. No.

Q. Coming back, Mr. Strassberger, to the matter of these elevations. Did you at the recess send for your records regarding elevations?

A. No, I was looking up these other records you asked for.

Q. Well, maybe we can get along without your records. Did you verify any street elevations when you were City Engineer of the City of Butte in the area between Wyoming street on the east and Galena street on the north and Platinum street on the south and Jackson street on the west?

A. I ran a set of levels over taking the bench marks as given in the ordinances, the City Ordinances, and ran a set of levels over an area in there.

Q. Did you verify elevations then?

A. I checked them, yes.

Q. I will ask you whether or not on the trial of the case of Robert E. Ammerman vs. Butte Copper & Zinc Co. [244] et al. tried in this court in November, 1945, when you testified as a witness whether or not you were asked the same question, "Did you verify any street elevations when you

(Testimony of Edgar J. Strassberger.)

were City Engineer in the area between Wyoming street on the east and Galena street on the north, Platinum street on the south and Jackson street on the west," and whether or not you did not reply, "Well, I can't remember whether I did or not"?

A. I can explain that.

Q. I am asking you whether or not you were asked such a question and gave such a reply?

Mr. Maury: The witness should be shown the record.

A. I understand that.

The Court: Just a minute. Show the witness the record. (Counsel shows witness record.)

A. I probably gave that answer. May I explain it.

The Court: Yes.

A. Mr. Finlen is asking technical questions I been dealing with for forty-five years and his question does not mean anything to me or any other engineer unless said engineer was given a definition of what the attorney means by "did you verify." Now you can carry in a set of levels from the Pacific ocean by precise levels and get them into Butte. Now there has been two or three such sets. The A.C.M. is using one set, the City of Butte is using one set, and Strassberger is trying to reconcile the other sets. Now the idea of asking an engineer if he verified is ambiguous and not at all understanding to me. When I answered that question that way it was the best I could answer and today I tried to give you an [245] answer by skimming over this

(Testimony of Edgar J. Strassberger.)

explanation "Did I verify it." Where do you want me to go and verify it?

Q. In this court a few moments ago you answered that question in the affirmative did you not?

A. I tried to give you a sensible answer.

Q. In the same court at the trial of the Ammerman case you answered that same question in the negative did you not?

A. It could be answered both in the negative and affirmative.

The Court: Strike the answer as not responsive to the question.

A. I don't understand him and he don't understand me.

The Court: That question is perfectly intelligible. He is asking you what you did today and sometime in the past.

A. If I said no, which I evidently did—(interrupted).

The Court: As I recall it you didn't say no. From the answer you said you didn't remember. That seems to be the answer of the question given at the former trial. Is that correct, Mr. Finlen?

Mr. Finlen: The answer reads "I can't remember whether I did or not." (Page 419.)

Q. (By Mr. Finlen): Well, Mr. Strassberger, you testified you as City Engineer used a certain plat during sometime between 1920 and 1922, both years inclusive, and that that plat showed certain elevations. Is that correct?

A. I don't remember.

(Testimony of Edgar J. Strassberger.)

Q. You don't remember whether the plat did show any elevations or not? [246]

A. I don't remember what plat you refer to.

The Court: Read that question to me Mr. Reporter.

(Reporter reads question.)

Answer that yes or no, if you gave that testimony in this case?

A. I probably did; I don't remember.

The Court: Very well, proceed.

Q. (By Mr. Finlen): Whether you gave the testimony or not, Mr. Strassberger, I will ask you now whether as City Engineer during the period from and including 1920 to and including 1922 you had occasion to refer to a plat showing an area in the neighborhood of the Poague residence which also gave the elevations?

A. The only plat I can recall would be sewer profiles along that street for reference, or the ordinance; and they both would be the same. If I referred to the ordinances or a profile map I would get the elevation of a certain street corner and I used that official elevation to run my levels over the rest of the area and I would check on other street corners as I went along, and that's what I thought you meant by verifying.

Q. Well now, you did use a certain ordinance or plat or map that gave elevations?

A. Yes, sir.

Q. Did you verify, actually yourself verify or take the elevations shown upon that plat or map or

(Testimony of Edgar J. Strassberger.)  
ordinance to determine whether or not the elevations  
as given thereon were correct?

A. Relatively.

Q. Relatively? [247]

A. Yes.

The Court: Strike the answer. That's not responsive to the question.

Mr. Maury: We except to that.

The Court: Exception is granted. The question as I understand it calls for a yes or no answer. He asked whether he did or did not check.

Mr. Maury: I think the court should judicially note that nobody has verified an elevation here for fifty years from seacoast up.

The Court: The court does not judicially know that. It may have been done many, many times.

Mr. Finlen: We want an explanation about that because he testified he has verified it.

(Question repeated.)

The Court: That answer is ordered stricken.

A. May I explain what I did.

Mr. Finlen: You may say whether you did or did not do as I asked.

The Court: If you don't understand the question you may so state.

Mr. Genzberger: We object to the question as complex.

The Court: Objection overruled. If the witness does not understand the question, he can so state.

A. I don't understand the question.

(Testimony of Edgar J. Strassberger.)

The Court: What is there about the question you don't understand?

A. Your Honor, to verify an elevation,—the elevations are given above sea level and even when they start out at sea level they assume a certain elevation. That's carried into Butte and the City of Butte has adopted a certain [248] elevation for the corner of these streets. I assumed that's right and I adopted the elevations as given in the ordinances and I used those elevations as the starting point and checked all the other elevations in that area, but to verify I can't understand how any engineer—

Q. As a matter of fact from your testimony you actually never verified the elevation?

A. No, I never did.

Q. That's all Mr. Finlen been asking you whether you did or didn't?

A. I checked the relative elevations of all those corners from the bench mark I assumed as correct.

Q. (By Mr. Finlen): Did you make any determination yourself that the elevations as shown on that plat, map or ordinance were correct?

A. No, I assumed them to be correct.

Q. Now you state that since you were City Engineer you have actually determined that some of the elevations shown on that map, plat or ordinance have changed?      A. That's correct.

Q. Where did you make any such determination?

A. All the way— (interrupted).

(Testimony of Edgar J. Strassberger.)

Q. Within the area, Mr. Strassberger, bounded by Wyoming, Galena, Platinum and Jackson?

A. As I can recall without looking at my notes I went as far west as Washington, as far east as Colorado and north to Silver and south to Gold. That's my present recollection. I ran levels in that area on all the [249] street corners, block corners, including alleys where they came into the street lines.

Q. What elevation in that area shown on the map, plat or ordinance that you referred to as City Engineer did you determine subsequently to have changed?

A. Will you please read that to me?

(Question repeated.)

A. The survey showed that considerable corners changed from the official records of those corners.

Q. What corners?

A. I would have to refer to my notes.

Q. Are you able to state any elevation that's changed? A. No, not offhand.

Q. Are you able to state any corner where you found a bench mark?

A. I assumed a bench mark at the southeast corner of Idaho and Silver and ran several other corners to check it and when several corners gave approximately the same proper official elevation I assumed that as the elevation to work on. Then it became relative between the rest of the elevations, the rest of the official elevations and the actual elevations I found.

(Testimony of Edgar J. Strassberger.)

Q. Did you find a bench mark at the southeast corner of Idaho and Silver streets?

A. I took the surface of the sidewalk at the corner.

Q. Did you determine the elevation there?

A. I assumed it as given in the ordinance.

Q. What elevation was given at the sidewalk at the corner?

A. I would have to look at the ordinance.

Q. Subsequently to looking at the ordinance did you [250] determine the elevation at that point?

A. No, I assumed it; I took it from the ordinance.

Q. Did there not come a time when you determined the elevation had changed?

A. For instance, if the elevation at that corner was 555 and the next two or three blocks north and south or north and west gave the same relative elevation as the official, then I assumed that 555 at that corner was correct, and then I used that as my bench mark and went through the rest of the area.

Q. Did you ever actually determine, Mr. Strassberger, that the elevation assumed by you at the southeast corner of Idaho and Silver street had changed?

A. It hadn't changed subsequently, three or four months. I used that elevation three or four times but what it is today I don't know.

Q. Was that sidewalk to which you have referred at the southeast corner of Idaho and Silver installed

(Testimony of Edgar J. Strassberger.)

when the plat or map or ordinance that you referred to was made or passed?

A. I wouldn't be able to tell but the City Engineer at the time should have used the same elevations I did to build a sidewalk to grade.

Q. Do you know whether they did or not?

A. No.

Q. Can you tell me of any change in elevations during any period at any point in the neighborhood of the Poague property and if so, inform us what the change was?

A. Well, my map of that district will show the elevations as I found them to be by actual survey, but you can [251] go down on Dakota and Porphyry, the south side of Porphyry, and look at the sidewalk there and without an instrument you can see a big change.

Q. I am asking you if you, as an Engineer, determined any change, and if so what the extent of the change was?

A. I ran levels over like I did a few years ago.

Q. Where, at what point?

A. All the block corners within the area I described a few moments ago.

Q. Have changed?

A. A good many of them have changed. I would have to look up the records to tell you the amount of inches.

Q. Could you tell us one particular block corner that has changed, and if so the extent of the change?

(Testimony of Edgar J. Strassberger.)

A. Well, if I am permitted to guess.

Mr. Maury: Get your records.

Q. I am not asking you to guess?

A. I can't interpret records without looking at them.

Q. I am asking you if without looking at your office records you could tell us of any change?

The Court: I think the witness testified several times he has records and that he is unable to answer your question without reference to his records, so I think we better pass that for the time.

Mr. Finlen: In the interest of time we will forego the record and turn the witness over.

#### Redirect Examination

By Mr. Maury:

Q. Mr. Strassberger, did you assume that Mr. Plummer, when on the witness stand, was telling the truth from his records? [252]

Mr. Finlen: Just a minute. We object to that,—

The Court: Sustained.

Mr. Maury: This is the witness that has testified as to his opinion.

The Court: Counsel desires to make an objection.

Mr. Finlen: Objected to on the grounds and for the reason it calls for a conclusion of the witness; upon the further ground and further reason it invades the province of this jury.

The Court: Sustained. The law presumes the witness did tell the truth when he went on the stand.

(Testimony of Edgar J. Strassberger.)

Q. And when you said that you believed that the majority of these breaks in the water mains there were due to subsidence, had you heard the testimony of Mr. Plummer? A. Yes, sir.

Q. And had you heard the nature of that testimony? A. Yes, sir.

Q. As to which of the breaks were telescopes, which of the breaks were pulls? A. Yes, sir.

Q. And which were leaking?

A. Yes, sir; that's right.

Q. And was your opinion based in any way on that testimony? A. Entirely.

Q. Entirely on that testimony. And you heard him reading from records that had been made in the ordinary course of business of the Water Company? A. Yes, sir.

Q. And was your opinion based on those records?

A. That's right.

Q. Now you have been asked as to certain breaks. Have you observed breaks in water mains immediately south of an escarpment? A. Yes, sir.

Q. And what escarpment?

A. The Zaroma-Emma.

Q. Where does that escarpment start on the east as far as you know? A. On the east?

Q. Yes, as far as you have observed?

A. Well, close to the Emma shaft; probably a little east of the Emma shaft.

Q. Have you observed that escarpment in the Synagogue, the Jewish church? A. Yes, sir.

Q. Near the Reynolds & McDowell building?

A. Yes, sir.

(Testimony of Edgar J. Strassberger.)

Q. Where does that escarpment run going westerly?

Mr. Finlen: Objected to as improper redirect examination; repetitious.

Mr. Maury: We want to connect that with these breaks.

The Court: It may be improper redirect examination and if it is I will permit the counsel to reopen direct examination. The objection is overruled.

Q. Have you the question in mind?

(Question repeated.)

A. I think he wants to know the direction west of the Jewish synagogue.

The Court: You better read the question to the witness.

Q. (By Mr. Maury): (Question repeated.)

A. It runs across Silver street at the north line or near the north line of—let me start that over again. It runs westerly crossing Dakota street close to the north line of Silver; thence diagonally toward the church at the southeast corner of Porphyry and Montana street, on the south side of that. There are several escarpments crossing Montana street in a parallel direction. How far do you want me to go west? It crosses to the position of the Bernice apartments on the west side of Montana street, one of the escarpments does; and thence it crosses Idaho street at the Morgan property which is about thirty or forty feet north of Porphyry street; then it crosses diagonally toward the northwest corner of Idaho and Porphyry at the point where Mr. Finlen

(Testimony of Edgar J. Strassberger.)

asked me several times, or asked me about several breaks in the water pipe. It crosses the water pipe in that location and then it goes southwesterly to the old Columbia hospital.

Q. Now I will ask you if all of the ground south of that escarpment and for a distance of 500 feet south is of the same level as it was in 1922?

A. No, sir.

Q. And is it plain to be seen that that ground has sunk right at that escarpment?

A. The north side of the escarpment is higher than the south side of the escarpment within a few inches. The normal level of the street was on a grade, even grade, and where that escarpment comes the south side dropped very perceptibly making a steep angle in the pavement.

Q. Are they successive drops south of that escarpment? A. Yes, sir. [255]

Q. For what distance, approximately?

A. They show more clearly going down Montana street than either Idaho or Dakota until you come to a very large one in, I think it's the 600 block on Dakota street, and that's more than 500 feet below the one you speak of.

Q. Can you tell the court and jury if the ground has settled clear down to Aluminum street from that escarpment?

A. My opinion is that it has.

Q. And is it there to be seen?

A. Yes, sir; you can find evidence of subsidence.

Q. What is that evidence?

(Testimony of Edgar J. Strassberger.)

A. Broken sidewalks and buildings cracked.

Mr. Finlen: We object to that as calling for repetition.

The Court: Overruled.

Q. Go ahead.

A. And evidence of water pipes and gas pipes being broken and an explosion down at Aluminum.

Q. And were all of the points that Mr. Finlen asked you about in that area of subsidence?

A. Yes. They are in the area of subsidence.

Q. I mean the points of breakage of water mains.

A. Yes, sir.

Q. And had you walked over—or tell the court and jury when that subsidence, that escarpment first appeared on the surface so far as land which you were observing and were familiar with?

A. Well, the first one that I observed was an escarpment crossing Montana street about the southwest corner of Montana and Porphyry where the Jenson Drug is located [256] and diagonally northeasterly crossing Montana street into the Lloyd building. It entered the Lloyd building and continued northeasterly toward the intersection of Dakota and Porphyry.

Q. How close is the intersection of Dakota and Porphyry to the Poague property?

A. The north boundary of the Poague property is ninety feet south of the south line of Porphyry street.

Mr. Dwyer: We object as this witness has covered the same ground two or three times giving the directions and distance and so on.

(Testimony of Edgar J. Strassberger.)

The Court: Overruled.

Q. What was your answer?

A. Ninety feet.

Q. When did you first observe that escarpment, approximately?

A. I think in 1943; maybe 1942. Along in there.

Q. Was it there any great length of time before you observed it?

A. No, I don't think so. It was a pretty smooth street at the time.

Q. And was there a fresh break in the earth's surface from Gold street to the Jewish church in the Fall of 1944?

Mr. Finlen: We object to that as leading.

The Court: Overruled.

A. Well, subsequent to the one I just testified to it could have been in 1944. There was a small break at the intersection or north of the intersection of Gold and Jackson streets. It was just appearing. In fact I observed it and I thought some child had made a mark in [257] the dirt crossing the lot and I went and looked at it and it was just the beginning of an escarpment.

Q. When did that occur?

A. To the best of my recollection some time in 1944.

Q. And then did you observe its course or whether it changed or not?

A. I observed it that time and subsequent to that time. At that time I couldn't trace it over a hundred feet coming northeasterly. A little later I found a

(Testimony of Edgar J. Strassberger.)

continuation of that same escarpment going north-easterly.

Q. And then did it remain the same, or change?

A. It got very much worse.

Q. By very much worse?

A. It got bigger.

Q. It got bigger?      A. Yes, sir.

Q. And how about the upper side corresponding with the lower side?

A. The lower side became lower in elevation than the upper side.

Q. Did it then become traceable clear through to the Jewish church?      A. It did.

Q. I will ask you if that escarpment existed on the surface any earlier than 1942 in the area that you have mentioned from Cold street and Jackson to the Jewish church?      A. Not to my knowledge.

Q. Did you walk over it frequently?

A. Yes, sir.

Q. And did you reside close to that area? [258]

A. I did.

Q. During all of that time?      A. I did.

Mr. Maury: I think that's all. We may want a question or two in the morning, your Honor, but at the present that's all.

Q. (By Mr. Maury): Is that escarpment from Gold street and Jackson street through northeasterly to the Jewish Synagogue observable at this time on the surface?      A. Yes, sir.

Q. And can it be observed where it crosses Wash-

(Testimony of Edgar J. Strassberger.)

ington street, Idaho street, Montana street, Dakota street and Jackson street?

A. Yes, it can be determined crossing all those streets.

Q. And anyone going there could see it right now? A. They could if they looked for it.

(Whereupon, an adjournment was taken until Thursday, April 3rd, 1947, at 10:00 o'clock a.m., when the trial resumed with Edgar Strassberger on the witness stand for further re-direct examination by Mr. Maury.)

The Court: Proceed, gentlemen, with the trial.

Q. (By Mr. Maury): Mr. Strassberger, on yesterday you were asked about certain elevations by the defendant's counsel, and whether they had changed, and you said that you could produce notes of the surveys that you had made and that it would enable you to testify which elevations had changed in the district? A. That is right.

Q. Have you those notes here?

A. Yes, sir.

Mr. Maury: I believe you requested this. (Handing [259] document to counsel for the defense.)

Q. Are these the notes, or does this sheet contain the notes which you referred to in your testimony yesterday? A. It does.

Q. You may tell the Court if those notes enable you to speak with accuracy what elevations have changed in street corners below Silver street, east of Montana street, north and including Porphyry street and west of Main street?

(Testimony of Edgar J. Strassberger.)

Mr. Finlen: I ask permission to interrogate the witness with reference to what elevations appear upon the notes.

The Court: Very well.

Examination

By Mr. Finlen:

Q. What original elevations appear upon your notes, Mr. Strassberger?

A. The official elevations used by the City of Butte in determining street grades and sidewalk elevations in that district.

Q. Is the instrument which you are now looking at an official City of Butte plat or instrument?

A. No, sir.

Q. But one prepared by you?

A. Prepared by me, yes.

Q. Were any of the elevations as shown to be official, or so called official elevations, verified by you?

Mr. Maury: We ask for better meaning of the word "verified." The actual verification means starting at sea level and running by railroads to Butte. That is, those elevations were made some 75 years ago, and then they have been used with certain bench marks that were [260] attached to those original verifications, or first ascertainment of elevations—

Mr. Dwyer (Interrupting): We object to counsel testifying and suggesting to the witness what to testify to in this case.

(Testimony of Edgar J. Strassberger.)

Mr. Maury (Continuing): and then the City and County engineers and surveyors verified with reference to bench marks here in this neighborhood that has been accepted since 1883 or 1884; and there is a difference in the meaning of the word "verified." "Verified" may be by sea level or verified from government bench marks which are accepted.

The Court: I think the whole matter was gone into at length yesterday, Mr. Maury, and the witness has testified that he did not verify any of the elevations; that he assumed and accepted as true some starting point or bench mark here in Butte and worked from that bench mark from which he took his elevations and measurements. That was gone into yesterday and he stated he did not verify the elevation since, as I understand the question so put by counsel. Is that true or not, Mr. Strassberger?

A. That is correct.

The Court: Proceed.

Mr. Finlen: We object to any testimony concerning the elevations unless they have been actually verified by the witness.

The Court: The objection is overruled. He apparently used as a starting point something that is taken to be true by the city officials here in establishing street levels and grades. [261]

Mr. Dwyer: There is no evidence in the record that these papers now being presented are taken to be true by the City. The proper way to prove the city records would be by the records themselves, and they are available to the attorneys if they wish to bring them in here.

(Testimony of Edgar J. Strassberger.)

The Court: I think you are correct except there has been much testimony given with reference to city maps and elevations on the city map and there wasn't any objection made at the time; had it been that the map itself was the best evidence, the objection would be well taken, but now in view of the testimony that has been given, it is too late. Proceed.

Mr. Finlen: That is all.

#### Further Redirect Examination

By Mr. Maury:

Q. You may tell the Court what street corners in that area have changed their elevation since 1922?

Mr. Finlen: To which the defendant objects on the ground and for the reason that it appears from the examination thus far that the question calls for information predicated upon so-called elevations that have not been verified by the witness, and has merely been assumed by him to be correct. On the further ground and for the further reason that it appears that the original elevations concerning which the witness might testify are taken from or purported to be taken from city maps or plats, and that such maps or plats are the best evidence of such elevations.

The Court: Overruled.

Mr. Finlen: Exception. [262]

Q. (Question repeated).

A. You want to know the change in elevations in certain blocks in that area?

(Testimony of Edgar J. Strassberger.)

A. Yes, and I asked for the street intersections or the corners.

The Court: Mr. Strassberger, when did you make the survey on which you compiled the map?

A. This survey was made in June, 1943.

The Court: And was that made by yourself or under your direction?

A. I ran the instrument and had helpers with me.

The Court: How long after you did the actual work on surveying, did you make the map in question? A. Very shortly after.

The Court: And you keep notes of your survey as you make it? A. Yes, sir.

The Court: Did you make the plat from those notes? A. Yes, sir.

The Court: What have you got to say as to whether or not that plat is or is not correct?

A. The plat is correct.

The Court: And that it truthfully reflects the result of the survey you made and the notes you took at the time you were making the survey?

A. It does.

The Court: Very well.

Mr. Finlen: It now appears the last survey being made in 1943 and prior to the filing of the complaint in this action, the defendant objects on the ground and for the [263] reason that any change shown would only be a change determined prior to the filing of the complaint; and secondly, it is incompetent, irrelevant and immaterial for the pur-

(Testimony of Edgar J. Strassberger.)

pose of proving or disproving the issues in this case.

The Court: Overruled.

Mr. Finlen: Exception.

Q. (Mr. Maury): Now answer the question.

A. You want me to read all the elevations in that area, or any specific elevations?

Q. Just read the elevations. I asked for changes in elevations starting at Porphyry and Dakota street.

A. Porphyry and Dakota—the official elevation as contained in the city ordinance of the northwest corner of Porphyry and Dakota street is 617 feet. That is above sea level, our elevations as used for the City of Butte.

Q. 617?

A. Yes, the elevations given on this map are the last three figures before the decimal. 617 is probably 5,617. My elevation shown at the time I made the survey 615.71.

Q. What is the difference in inches?

A. That is given in feet.

Q. What is the difference in feet and inches?

A. One foot and 10/100ths of a foot lower.

Q. In 1943 then, the official elevation that you spoke of? A. That is right.

Q. Now you may take the corner—have you got the corner of Main and Porphyry and Dakota street? A. Yes, sir.

Q. Have you got three other corners? [264]

A. Yes, I have all those corners.

(Testimony of Edgar J. Strassberger.)

Q. What is the difference in the other three corners?

Mr. Finlen: For the purpose of the record, may the objections made at the time the last objections were interposed by the defendant and the objections before that be considered as going to all this testimony without the necessity of repeating.

The Court: Very well, the record may show it is considered that the defendant objects to each question asked to the witness, upon the same grounds as those expressed at length in the last two objections made by counsel; that the objections are overruled and the defendant is granted an exception to each of the rulings of the Court. Proceed.

A. The southwest corner of Dakota and Porphyry Street, the difference of the official elevation and the elevation I took is 1.97 feet; one foot and 97/100ths of a foot lower; the southeast corner is a difference of three and 27/100ths of a foot lower; the northeast corner is two and 12/100ths feet lower.

Q. The southeast corner?

A. I gave the four corners.

Q. Have you any notations there on Gold and Dakota street?

A. No, I have not. I have the official on Gold but I didn't run that far down at that time.

Q. Have you notations on Silver and Dakota?

A. Yes, sir.

Q. What if any change in elevation from the official elevation did you find there in 1943? [265]

A. Beginning at the northwest corner of Silver

(Testimony of Edgar J. Strassberger.)

and Dakota, the change is 32/100ths of a foot; about four inches higher. At the southwest corner is 58/100ths of a foot lower; about seven inches.

Q. And at the other corners?

A. At the southeast corner is 72/100ths of a foot; about nine inches lower. At the northeast corner it is very close to the official elevation. The official elevation there is 642 and my elevation is 641.93; that is 7/100ths of a foot greater.

Q. And there would be no appreciable difference?

A. No; you could probably pick it up where the rod was moved one way or the other.

Q. That would not be regarded as any change?

A. No, I wouldn't say there was any change there.

Q. Have you any data there as to the elevation at Montana and Porphyry?

A. Just at the northeast corner of Montana and Porphyry.

Q. What if any change?

A. The difference in elevation there is 28/100ths of a foot; that would be about three inches it showed at that time an increase higher than the official?

Q. It showed higher than the official?

A. That is right.

Q. Have you other elevations there in that area?

A. At the corner of Porphyry and the alley—wait a minute. I gave you the wrong one—the point I gave you there was Idaho and Porphyry.

Q. I wish Montana and Porphyry? [266]

(Testimony of Edgar J. Strassberger.)

A. I made a mistake; I gave you the four corners on Montana.

Q. Give the four corners of Montana and Porphyry?

A. The difference in elevation of the northwest corner of Montana and Porphyry is a sinking of 34/100ths, about four or five inches. The southwest corner of Porphyry and Montana is lower 43/100ths of a foot, that is about five inches; the southeast corner of Montana and Porphyry has quite a change. The official is 628 and I got 625.93. There is two and 7/10th of a foot—two and 7/100ths of a foot.

Q. Do you recall and can you fix that corner by a building that was there?

A. That is where the Lloyd Building was damaged and torn down.

Q. Now, the southwest corner—the other corners?

A. The northeast corner, at the northeast corner there was a subsidence shown in the sidewalk, one part of the sidewalk was like this desk (indicating), and right at the actual corner it dropped down. I took both elevations and compared it with the official elevations. The official elevation is 632 and the high point is 630.96, and is a foot and 4/100th lower than the official; and the lower point is one foot and 34/100ths feet lower than the official.

Q. How close is that to the Ella Poague property and in which direction?

A. The Ella Poague property lies southeasterly

(Testimony of Edgar J. Strassberger.)

I would say about,—well it would cross Porphyry street to Dakota. This map doesn't give the distance of the [267] street, but it is a block east and three lots south of the last corner I gave. Pardon me—it is a block east and 170 feet south to the north line of the Poague property, at the east end of the Poague property.

Q. From the Lloyd property you spoke of?

A. No, I gave it to you from the Lloyd property; I gave it to you from the northeast corner of Montana and Porphyry. The Lloyd property is the southeast corner.

Q. I wish the distance from the southeast corner. I was mixed up.

A. Well, it is closer to the Lloyd property.

Q. Mr. Strassberger, yesterday afternoon you spoke, in answer to Mr. Finlen, of an escarpment crossing the street below the Poague property?

A. Yes, sir.

Q. Have you a photograph of that escarpment?

A. Yes, sir. Well, I wouldn't say it was of that escarpment. It was the sidewalk where the escarpment was under.

Q. Is this the photograph?      A. It is.

Mr. Maury: We offer it in evidence.

Mr. Finlen: We object to the photograph on the ground and for the reason it is too remote; there is no showing where it is. On the further ground and for the further reason that it is improper redirect.

The Court: Well, I think that portion of the

(Testimony of Edgar J. Strassberger.)

objection "there is no showing where it is" is well taken.

Mr. Maury: I'll further identify it.

Q. Mr. Strassberger, of what point is that a photograph? [268]

A. That is a photograph at a point, the building number is 524 South Dakota street. It is the block below the Poague property.

Q. And on the same street?

A. On Dakota street, yes sir.

Mr. Maury: We offer it.

The Court: The time of taking the photograph should be fixed.

Q. (Mr. Maury) When, approximately, was the photograph taken?

A. That was taken June 27, 1943.

Mr. Finlen: We renew our objection and the further objection that it shows a condition prior to the filing of the complaint in this action.

The Court: The objection will be overruled and the exhibit admitted in evidence.

(Plaintiff's Exhibit No. 27, a photo of building at 524 So. Dakota St. taken June 27, 1943, was here received in evidence. The same will be certified to the Circuit Court by the Clerk of this court).

Q. Have you noticed any change in elevation nearer to the Poague property than those you have mentioned?

A. I testified the different elevations of the southeast corner of Porphyry and Dakota which

(Testimony of Edgar J. Strassberger.)

would be about 90 feet north of the Poague property; that is 90 feet north of the east end of the Poague property. I also took the elevation at the alley, which would be also 90 feet north of the rear end of the Poague property, and the elevation crossing the alley.

Q. What were the changes in those elevations?

A. Taking the southwest corner of Dakota alley and Porphyry street, using the city system of naming the alleys as the alley east of the street—no, west of the street—I am giving as Dakota alley. The difference there is a sinking of two and 14/100ths feet across the alley, the point 60 feet north of the rear end of the Poague property, which is the southeast corner of Porphyry and Dakota alley. There is a difference there of three feet, a sinking of three feet.

Q. What direction is that point from the Emma shaft?

A. The Emma shaft is northeasterly a little over one block north and about a block—it is about a half a block east of Dakota street.

Q. And how far is that point from the Poague property and what direction?

A. Well, I would assume that to be between five and six hundred feet northeasterly.

Q. Of the Poague property?

A. Of the Poague property. That is the Emma shaft.

Q. I am talking about this point on the map and not the Emma shaft.

(Testimony of Edgar J. Strassberger.)

A. I testified one point on the alley was 90 feet north of the Poague property, directly north along the alley line, and the other point was on the alley line, crossing the alley. They both would be within 100 feet of the rear end of the Poague property on the alley.

Mr. Maury: That is all, take the witness.

Recross Examination

By Mr. Finlen:

Q. By whom were these so-called official elevation [270] established?

A. I believe they were established by the City Council.

Q. Did the City Council do the surveying?

A. No, I don't think so.

Q. Well, that's what I am directing your attention to. Who determined the elevations?

A. I don't know.

Q. Do you know whether it was the engineer or not? A. I don't know who he was.

Q. When were they determined?

A. I would have to look up the ordinance to determine that.

Q. Can you determine it from the ordinance?

A. I imagine the ordinance would show the passage of some ordinance that dealt with the official elevations.

Q. I am not talking about the passage of the ordinance. I am talking about the time that the elevation was determined by the person who determined it. A. The time it was determined?

(Testimony of Edgar J. Strassberger.)

Q. Yes. A. Well, it was prior to 1920.

Q. How much prior?

A. I don't know. I don't know when it was established.

Q. Probably 75 years ago, would you say?

A. Well, I can't tell.

Q. Can you tell whether the elevations as determined were correct?

A. I assume them to be correct.

Mr. Finlen: I ask that the answer be stricken and [271] the witness respond to my question.

The Court: Yes, the answer will be stricken. Answer it yes or no. A. No.

Q. Now, let us take the first elevation at the northwest corner of Porphyry and Dakota street.

A. Yes, sir.

Q. Where the so-called official elevation differed from the elevation as assumed or determined by you in 1943?

A. Yes, sir. What is the question?

Q. I am merely directing your attention to it preliminarily.

A. The northwest corner of Porphyry and Dakota street, yes, sir.

Q. At what point on the northwest corner of Porphyry and Dakota street was the elevation determined in the so-called official determination?

A. At the intersection of the property lines.

Q. At the intersection of the property line?

A. Yes, sir.

Q. Is there a bench mark there?

A. No.

(Testimony of Edgar J. Strassberger.)

Q. And was there a bench mark there at the time you determined the elevation at that point?

A. No, sir.

Q. How do you know that the person or persons who made the so-called original determination of elevation used that point if they left no bench mark?

A. The sidewalk was graded, the ground was graded; [272] the cement sidewalk was put in usually to grade by the City Engineer.

Q. If you don't know when the original so-called official determination of elevation was made, how do you know that the sidewalk was there when the elevation was determined?

A. I don't know positively that.

Q. You don't know at all, do you, Mr. Strassberger?

Mr. Maury: Objected to as argumentative.

The Court: Sustained.

Mr. Finlen: Well, he doesn't know positively.

The Court: Well, if he doesn't know positively, he doesn't. That is the answer to the question.

Q. (By Mr. Finlen): Let us go to the elevation concerning which you testified, the southwest corner of Porphyry and Dakota street.

A. I could give the same answer to all of them.

Q. You don't know the point of determination of the elevation at any of the points concerning which you testified, by the person or persons who made the so-called original determination?

A. Yes, I know the points, but I understood you to ask if there was a bench mark left there.

Q. What point did the person or persons who made the determination of the southwest corner of Porphyry and Dakota street use?

A. The southwest corner of Porphyry and Dakota—now please repeat the question?

Q. What point did the person or persons who made the so-called official survey use at the southeast corner of [273] Porphyry and Dakota streets?

A. I assume he used an intersection of property lines.

Q. But do you know whether or not he did?

A. No, only the record shows that he did.

Q. What record?

A. The ordinance and the City maps.

Q. What ordinance?

A. The ordinance that adopted these elevations as official elevations.

Q. Are you referring to Ordinance number 130? (Handing document.)      A. Yes, that is right.

Q. What is there in that Ordinance that shows what point, at what point on the southwest corner of Porphyry and Dakota street the so-called official elevation was determined?

A. Why the City Engineers including myself, always use the intersections of the property lines as the point referred to in this ordinance where it says the northeast or northwest or southeast or southwest corner of any of the particular streets.

(Testimony of Edgar J. Strassberger.)

Q. In other words, you assumed that that was the point used without knowing?

A. Well, it is the custom.

Q. That is your custom and assumption, is that correct?

A. That is all the custom I know of interpreting their maps and elevations.

Q. What was the custom when the original or so-called official determination was made?

A. I wasn't there when it was made, but that is my [274] interpretation, when they adopted the elevations they adopted at the intersection street lines.

Q. If you were not there, then, why do you say it was the custom?

A. Well, I practiced civil engineering in the City of Butte for forty years and I made very many determinations for grade to build and erect, and that is the custom.

Q. Will you answer my question?

Mr. Finlen: I ask that the answer be stricken.

The Court: The motion will be denied.

Q. Mr. Strassberger, do you know that the grade at any point concerning which you testified with reference to checking or verifying so-called official elevations was the same at the time you made your checking as it was at the time the elevation was, as you would call it, officially determined?

Mr. Maury: We object. He testified that all of them have changed; he has testified that all except one is changed.

(Testimony of Edgar J. Strassberger.)

The Court: That would be an answer to this question then, if that is a fact. That is what the counsel is asking him, as to whether or not there has been a change. I'll overrule the objection.

A. Before making a test on those blocks, I ran preliminary levels.

The Court (Interrupting): Just a minute: You were not asked about this. The question is whether or not there has been a change in grade or elevation from the time it was officially established. [275]      A. Yes, there was.

Q. (By Mr. Finlen): How do you know that if you didn't verify the official elevation?

A. I assumed the elevations of the block corners as established and adopted by the ordinances to be the official elevations, then before making a survey over the entire area I checked a number of blocks to see if the relative elevations agreed or checked, and when I found a section of that area where the subsidence was at a minimum and the various points checked that elevation, I assumed that particular block corner as correct and used that one point for the entire survey of that district. All the elevations are based on that particular point.

Q. Well, you didn't know that the elevation had changed except by assuming that the so-called official elevation was correct?

A. Well, it is more than assuming. I checked the neighboring elevations to prove to myself it was correct.

(Testimony of Edgar J. Strassberger.)

Q. Did you prove to yourself that the original elevation was correct, or so-called official elevation was correct?

A. So far as that part of the area is concerned, yes.

Q. What official elevations did you find to be correct?

A. At the southeast corner of Idaho and Silver.

Q. The southeast corner of Idaho and Silver, Mr. Strassberger? A. Yes, sir.

Q. That is the area that used to be known as Buffalo Gulch, is it not?

A. I don't think so. I think Buffalo Gulch is a [276] block and a half east of that point.

Q. Well, directing your attention to that point, is there a cement sidewalk there now?

A. Which point do you mean?

Q. The southeast corner of Idaho and Silver?

A. Yes, sir.

Q. A concrete sidewalk? A. Yes, sir.

Q. Does that concrete sidewalk extend to the corner of the property line?

A. It is on the property lines.

Q. Did you take your elevations at the top or upper surface of the sidewalk? A. Yes, sir.

Q. Do you know whether or not the sidewalk was in place there when the so-called official elevation was determined? A. No.

Q. Mr. Strassberger, I believe I asked you, but in case I have not, what is the date or what are the dates of the determination of the so-called official

(Testimony of Edgar J. Strassberger.)

elevations. I am not talking about the passage of the ordinance now. I am talking about the date the person or persons who made the determination, or arrived at their determination.

A. I don't know when they were first made.

Q. Showing you what has been marked for identification as Defendant's Exhibit 28, is this sheet concerning which you testified and used by you in testfifying with reference to changes in elevations?

A. Yes, sir. [277]

Q. And it was prepared by you?

A. It was.

Q. And so far as you know, is true and correct?

A. Yes, sir.

Mr. Finlen: If the Court please, we offer in evidence what has been marked for identification as Defendant's Exhibit 28.

Mr. Maury: We have no objection to it.

The Court: Very well, the exhibit will be received in evidence without objection.

(Defendant's Exhibit No. 28, a chart showing street grades, etc., was here received in evidence. The same will be certified to the Circuit Court by the clerk of this court.)

Mr. Finlen: And we ask leave that defendant may refer to it or show to the jury at any subsequent time.

The Court: It may be referred to by either counsel at any time during the progress of the trial.

Mr. Finlen: That is all.

(Testimony of Edgar J. Strassberger.)

Redirect Examination

By Mr. Maury:

Q. Mr. Strassberger, are those changes in elevation visible to the eye and can be seen at the present time?

Mr. Finlen: Object to that as calling for repetition.

The Court: Sustained.

Mr. Maury: That is all.

(Witness excused.) [278]

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WILLIAM A. O'KELLY

called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Maury:

Q. Mr. O'Kelly, please state your name to the court and jury? A. William A. O'Kelly.

Q. What official position do you hold with the Anaconda Copper Mining Company?

A. Chief mining engineer in Butte.

Q. And by "Butte" you mean the entire Butte district? A. Yes, sir.

Q. It would extend to anywhere in Silver Bow County? A. Yes, sir.

(Testimony of William A. O'Kelly.)

Q. How long have you held that position?

A. Since 1935.

Q. And before that, were you employed by the same company?      A. I was.

Q. How long, Mr. O'Kelly, and in what capacity?

A. I was employed since June, 1910, in various capacities of miner, sampler, mining engineer, geologist, assistant chief mining engineer.

Q. And during that time, Mr. O'Kelly, have you been familiar with the Emma Mine?

A. I have been familiar with the Emma Mine intimately since about 1932.

Q. And previous to that had you been down underground through the mine on work?

A. Yes, I have. [279]

Q. At frequent intervals?

A. Not prior to that frequently; occasionally.

Q. And since 1932 frequently?

A. Yes, sir.

Mr. Maury (Addressing counsel for defendant): I take it you will agree that Mr. O'Kelly's qualifications to testify as an expert are sufficient.

Mr. Dwyer: Considered so, an expert mining man and expert engineer. I thought you might be calling him in some other capacity.

Mr. Maury: No, not now.

Mr. Dwyer: We will admit Mr. O'Kelly's qualifications as a mining engineer, geologist, and experienced in the operation of a mine.

The Court: Let the record so show.

(Testimony of William A. O'Kelly.)

Q. (By Mr. Maury): How deep is the shaft on the Emma Mine, just approximation?

A. It is 50 feet or more below the 1600 level.

Q. And when did the work arrive at the 1600 level, approximately?

A. I think around 1915 or 1916; I would not be sure about the date; I would have to look that up.

Q. Mr. O'Kelly, can you tell the jury what a stope is?

A. A stope is an excavation between levels on the vein.

Q. Have progress maps been kept that were correct of the work done since 1915 in the Emma Mine? A. They have.

Q. And through the Emma shaft? [280]

A. Yes, sir.

Q. There is another mine connected with the Emma called the Travonia or Travoni; or does anybody know which it is?

A. Yes, I know it is Travonia.

Q. Are there underground connections between the Travonia and the Emma? A. There are.

Q. And when were they driven, the first of them?

A. The connections were driven since 1942, I believe.

Q. What company has been working the Emma Mine since 1917?

A. The Anaconda Copper Mining Company.

Q. And what company has been working the Travonia since it opened?

(Testimony of William A. O'Kelly.)

A. The same company.

Q. The Travonia had been worked many years, and probably it was the first quartz mine opened south of Walkerville?

A. I believe it was worked by the Clark interests at one time. In recent years it has been worked by the Anaconda Copper Mining Company.

Q. And by "recent years" you mean what?

A. Since 1940 or thereabout.

(Recess.)

Q. (By Mr. Maury): Mr. O'Kelly, since 1917 the underground workings in the Emma Mine have been exposed to air?

A. Certain portions of them. [281]

Q. So far as they have been made. I mean the mine has never been allowed to fill with water?

A. No.

Q. What effect has air on mine timbers?

A. Depending on the moisture content; moisture and warm air will change mining timbers.

Q. And by "warm" what degree of heat is classed warm?

A. Well, ground heat at that elevation would be enough, unless it were ventilated mechanically, or by man.

Q. And at times the Emma Mine has been worked?

A. The Emma Mine has been open and been in operation continuously.

Q. Has been worked at all times?

(Testimony of William A. O'Kelly.)

A. There has been work at all times to some extent.

Q. Ever since it was opened? A. Yes, sir.

Q. Mr. O'Kelly, are the stopes all timbered in the Emma Mine so far as you know?

A. I know they have been timbered.

Q. What kind of timbering is used in stopes?

A. Various systems of timbering are used. The principal method in use at the Emma would be the square set timbers in which the timbers are about ten by ten timbers which are placed in the mine with the height of about eight feet to the square area of about five and one-third feet.

Q. Are those timbers dressed chemically?

A. Some of them are.

Q. When did you commence dressing chemically? A. I couldn't say just the date. [282]

Q. Approximately?

A. Approximately 25 years ago.

Q. Are all mining timbers dressed since then, dressed chemically?

A. No, a very small proportion are dressed chemically?

Q. Are timbers in the stopes in the Emma Mine dressed chemically? A. No.

Q. What kind of timbering is used, pine or fir?

A. Usually fir.

Q. And the longer those timbers are exposed to the air, the more apt they are to disintegrate?

A. The timbers in the stopes are not exposed to air for a very long period, because filling is intro-

(Testimony of William A. O'Kelly.)

duced and they are then cut off from the action of the air.

Q. And the wider the vein of ore that is taken out, the less filling is mined as waste, is it not?

A. No, I wouldn't say that.

Q. For instance, the aim is to take out all the ore that is merchantable in the mine as you go along?      A. That is right.

Q. And the wider the ore body, the less waste is blasted down?

A. In stopes?

Q. Yes.

A. No, I would say the greater proportion of waste is blasted down.

Q. Can you tell us how deep in the workings from the Emma extend down the vein toward the south? [283]

A. The 2100 level is the bottom level of the mine and this is connected by a winze from the 1600 level of the Emma Mine.

Q. And the mine has been worked down a vein as far as the 2100 foot on the incline of the vein?

A. Approximately the 2100 level; sometimes it is not exactly the distance.

Q. And have progress maps been kept of that?

A. They have.

Q. You may describe to the court and jury the method of keeping the progress maps? I mean the manner of making the progress maps.

A. I think I understand. It is an important operation to keep the progress records, if I may

(Testimony of William A. O'Kelly.)

explain. The engineers are required to go underground and map accurately all excavations. The maps of those excavations are correlated with surveys of the underground workings by transit. The sketches are then brought into the office and platted on maps which represent every eight feet or approximately that in elevation over the entire properties of the company.

Q. And every effort is made to make correct progress maps, is it not?

A. They are correct.

Q. And those maps are then kept by you or in your department? A. Yes, sir.

Q. And you have given of the underground workings to Mr. Strassberger correct maps as to the progress of the workings in the area that were called for? [284] A. That is right.

Q. In September of 1945 did you notice a change in the surface of the earth near a corner of Gold and Jackson street?

A. I can't recall the date. I think it was about that date when I noticed a change in the street where there was a break occur, and the south portion of the street was lower in relation to the north portion along that plane.

Q. Now that has been called by you an escarpment? A. Yes.

Q. So far as you know, that escarpment had not existed there previous to 1945?

A. No, it had not.

Q. And when you saw it there, was it evidence of a new and recent change? A. It was.

(Testimony of William A. O'Kelly.)

Q. Was that escarpment traceable to the north-east?      A. Yes.

Q. Can you give the general outline of that escarpment as you could trace it on the surface?

A. Well, it could be traced in an almost straight line with slight deviations between that point and a point in an alley at the east side of the Jewish synagogue between Dakota and Colorado and north of Silver.

Q. Can you tell us where Nellie Poague's property is?

A. Yes, I have examined her property.

Q. Is that escarpment which you spoke of north of her property? [285]

A. It is north of her property.

Q. How far north?

A. I would say about a block and a half.

Q. And by a city block, does that mean 300 feet?

A. 300 feet or perhaps 450 feet, more or less.

Q. What caused that escarpment?

A. That escarpment was caused by movement of the middle fault, which is a large fault in this district that traverses the entire mining area, and the fault moved and caused the escarpment.

Q. And what caused the movement of the fault?

A. Well, I can't say what the total cause was, but my opinion is that mining in the Emma vein along which the fault runs had caused at least some of this movement.

Q. From Jackson and Gold through to the alley by the Jewish Synagogue?      A. Yes, sir.

(Testimony of William A. O'Kelly.)

Q. And have you found evidence of movement further south on Dakota street?

A. There is evidence to the eye of other escarpments along planes of movement south of that point on that line of movement.

Q. And how far to the south of Nellie Poague's property?

A. Well, I can't say except that possibly the 600 block, which would be Aluminum street.

Q. And the Webster School faced Aluminum from the north? A. Yes.

Q. Did that escarpment extend from the region of the [286] Webster School northeasterly towards Main street? A. No.

Q. Which way does it go?

A. Approximately east and west, I would say.

Q. How many escarpments have you noticed to the south of the escarpment that we speak of from the corner of Gold and Jackson to the alley by the Jewish Synagogue?

A. Well, just one escarpment along that line.

Q. I say, how many to the south of that have you noticed? A. I couldn't say.

Q. More than one? A. Yes, several.

Q. And when, approximately, did those escarpments first arise?

A. I first noticed them in 1941, and first noticed the one along the middle fault at that time.

Q. And what did you observe and where was it you first noticed it?

(Testimony of William A. O'Kelly.)

A. I first noticed it on Montana street between Silver and Porphyry near the Sullivan Tin Shop.

Q. And that was the escarpment of Gold and Jackson street to the alley, was it not?

A. Yes.

Q. When have you noticed other escarpments south of that?

A. Well, the second one that I remember was the one at Dakota street and Porphyry, the northwest corner of Dakota and Porphyry. [287]

Q. How close would that be to the Nellie Poague property?

A. 150 feet north of the Poague property, I should say.

Q. And when did you notice the one south of the Poague property first?

A. In the 500 block on Dakota Street I think in 1942 some time, I first noticed that one.

Q. And how did those dates correspond with the progress of work in the Emma mine, or in the Travonia Mine?

A. Those escarpments were observed almost simultaneously with the work mining the manganese ore for the war effort.

Q. And that would be about 1941, 1942 or 1943?

A. That is right.

Q. Or 1944 and 1945?

A. Yes, sir.

Q. And those escarpments were they caused by that mining?

A. I think they were. I think they were planes

(Testimony of William A. O'Kelly.)

of movement along the faults on veins and bounding blocks of the movement.

Q. And you spoke about fault planes running along the Emma vein from Gold Street and Jackson to the alley east of the Jewish Synagogue?

A. Yes, sir.

Q. Does that fault plane dip under the Nellie Poague property?

A. I can't say that. It has a dip but just how far [288] south I know it to be, it is difficult for me to say.

Q. What is the dip of that fault plane?

A. Well, I can't say that, Mr. Maury.

Q. Can you by data tell us what that dip is?

A. I could find out.

Q. That is what I mean. Can you find out and let us know this afternoon? A. Yes.

Q. And the dip does not vary, does it?

A. Yes, it does.

Q. Where does it vary?

A. Well, all veins and faults vary in dip.

Q. I wish you would find out the general course of the dip and average dip of that fault from a point on Dakota Street near Silver. You can do that? A. Yes.

Q. And tell us what the dip is to the south?

A. Yes.

Q. Now, is a fault characterized by slick material?

A. It is characterized herein Butte by a clay gouge.

(Testimony of William A. O'Kelly.)

Q. Can you give us any idea of the volume or width of the clay gouge? It differs on different faults but on that fault.

A. In the middle fault it would aggregate from perhaps eight, ten or twelve inches of gouge altogether.

Q. A fault is not caused by any physical mining of the Anaconda Company, is it? It is a natural thing.

A. Not a geological fault.

Q. This is a geological fault. I am not talking about human faults or anything like that, but a geological fault.

The Court: You might explain to the jury what a fault is.

Mr. Maury: Yes, that should be explained.

A. The crust of the earth is composed of blocks of solid material for some distance down and some geologists have indicated a depth as much as fifty miles for the big earth faults. The earthquakes are caused by a movement of those blocks on the earth's crust, and the slippage may be anywhere from fifteen to twenty feet between two blocks of the earth's crust, and that would cause a major disaster.

Q. Was the slippage of the San Francisco earthquake in 1907 but six feet?

A. No, it was a maximum of fifteen feet.

Mr. Finlen: This is very interesting but I don't see what it has to do with the case.

The Court: Very well, proceed.

(Testimony of William A. O'Kelly.)

A. (Continuing) Along those planes of movement between blocks of the earth's crust are what we call fault planes and those fault planes are characterized in the granite by clay, that is formed by a slippage between those planes underground and where you run across a clay slip you always know one block has moved in relation to the block on the other side of clay slipping.

Q. Is it a grinding instead of slipping?

A. Slipping and grinding of the material and particularly the granite will cause clay, while in some material it is not formed, it is formed in Butte in the [290] Butte granite because clay comes from the materials out of which granite is composed.

The Court: Mr. O'Kelly, when you refer to a fault, does that mean the resultant position of the earth after the slippage has occurred?

A. That would be the effect of the fault.

The Court: That would be the effect of the fault? A. Yes, sir.

The Court: And that is the visible effect?

A. The effect of the fault would be the appearance of the gouge with the clay slip; and I might state that in the Continental fault which moved about fifteen hundred feet which made 25 feet of slip; that is the gouge size of the fault is the width of the clay you meet underground when you meet plane movement.

Q. (By Mr. Maury): The Continental fault is the thing that looks like an old stage road going over the hills to the south?

(Testimony of William A. O'Kelly.)

A. No, that is the third time that I corrected you on that. That is a dyke and that is not a fault.

Q. Well, where is the Continental fault?

A. Just south of that, or west of it, rather.

Q. Mr. O'Kelly, you must correct me at all times when I don't know anything about the subject. Is the granite in Butte solid or has it joints?

A. All the granite has joints.

Q. About how close together are those joints in the granite of the Emma Mine?

A. I couldn't say.

Q. I mean, of an average, are the joints within a [291] foot or two feet of each other?

A. In some places, and other places might be five or six feet apart.

Q. The granite then is not what you call a solid mass but has riffs or seams in it?

A. If you would drill through it, you would consider it solid because the joints or seams are sealed with mineralization as a rule.

Q. But you never saw a piece of granite that is five cubic feet in each direction?

A. You see very large blocks of granite in the area around Butte.

Q. But I mean in the mines of Butte, you never take out a piece of granite five cubic feet?

A. Yes, quite often.

Q. But the average is much less?

A. The average is less.

(Testimony of William A. O'Kelly.)

Q. Do the solids flow under sufficient pressure?

A. Well, it is said they do.

Q. That is accepted by the engineering fraternity? A. I think so, yes.

Q. As a truth? A. Yes.

Q. How many tons or pounds would be in a cubic yard of granite, approximately?

A. It runs in Butte about 12 cubic feet per ton in solid form.

Q. And as a mine grows deeper, the weight upon the timber increases, doesn't it?

A. No, I don't think so. [292]

Q. You don't think that it is subject to pressure and greater pressure?

A. Not in Butte; I haven't observed that in Butte.

Q. Have you noticed that your stopes cave when left?

A. If they have not been filled.

Q. They do cave?

A. If they haven't been filled.

Q. What causes that caving?

A. Primarily, it is caused by the action of the air on the portions of the walls or sides of the excavation that has been shattered by blasting.

Q. When the ore, or material, whatever it is, is removed close to a fault, is there a tendency of the material above to slip down into the excavation? A. That is right.

Q. And that really is what caused that escarpment from Gold Street to the alley, is it not?

(Testimony of William A. O'Kelly.)

A. My opinion is that it caused part of it.

Q. That it was a contributing cause?

A. Contributing factor.

Q. Mr. O'Kelly, the area affected by underground mining is not always in a vertical direction, is it?

A. Well, I would say it was primarily in a vertical direction. It is gravity which causes movement; it is the weight of the material.

Q. Primarily, but I am talking about the result of underground mining in a vein. The surface area affected is not always vertical above the excavation, is it?

A. Areas could be affected that are not vertically over the openings, that is true. [293]

Q. There is an area affected at the Columbia Hospital by underground workings from either the Emma or Travonia?      A. Yes.

Q. And the underground workings are not vertically under the area affected at the Columbia Hospital, are they?

A. No, but the fault is under that or runs through it.

Q. The fault runs through right at that point?

A. Yes.

Q. And the mine workings are how far to the south vertically of that point?

A. I would say around 300 feet. Is that what I said before?

Q. No, 250 feet.

A. Well, I'll make it 250, then.

(Testimony of William A. O'Kelly.)

Q. And they are on the 300 level?

A. That is below the 300 level.

Q. Would your mind have been fresher some year or two years ago?

A. You said how far is the first workings?

Q. Yes. A. They are on the 300 level.

Q. And the first workings on the 300 level would be 250 feet south of the effect at the Columbia Hospital? A. Yes, sir.

Q. And the other workings were below the 300?

A. There was no stoping above the 300.

Q. There was no stoping above the 300? [294]

A. No.

Q. And it was caused by mining there at the 300 level?

A. It was caused by movement of the middle fault which I think was partially caused by the mining below.

Q. And the mining was from 300 down?

A. Yes, sir.

Q. The levels are substantially 100 feet apart?

A. Well, they are not, but for the purpose of illustrating the matter to the jury, they could be called that.

Q. They are sometimes 125 feet? A. Yes.

Q. And sometimes 90 feet?

A. That is right.

Q. As you leave the point at the Columbia Hospital going below the 300 workings get further from the vertical than at the 300?

A. That is right.

(Testimony of William A. O'Kelly.)

Q. So that the underground mining might have been as deep there as 1500 feet?      A. No.

Q. How deep?

A. I would say ten or twelve.

Q. Ten or twelve hundred feet?

A. Yes.

Q. Now, have the workings of the Emma Mine gone directly under the Nellie Poague property?

A. Yes, they have.

Q. And when would you assign as near as you can from memory the date that those workings got under the [295] Ella Poague property?

A. I think as early as 1918 the workings probably ran under that area.

Q. And then they were extended further to the south on the vein?      A. Yes.

Q. When did the main work for the taking of manganese for the government as you say, for the government, commence at that region of the Emma Mine?

A. I would have to examine the records to say exactly but probably 1941 or 1942.

Q. That is close enough. We don't ask you to examine them or be bothered about it any further. Can you give us just roughly the approximate number of tons taken from the Emma shaft since 1940?

A. Well, I couldn't exactly.

Q. I know not exactly, but can you within a million tons?

The Court: I think that would certainly not be exact enough.

(Testimony of William A. O'Kelly.)

A. I have not memorized these things but I can look it up and tell you.

Q. Can you tell us at two o'clock?

Mr. Dwyer: Of course, we object to anything like that as not within the issues here.

The Court: The objection is sustained.

Mr. Maury: We except.

The Court: Granted.

Mr. Maury: You may cross-examine. [296]

#### Cross-Examination

By Mr. Dwyer:

Q. Are you familiar with the type of mining carried on in the Emma Mine under the lease of the Butte Copper and Zinc Company to the Anaconda Copper Mining Company? A. I am.

Q. What have you got to say as to what that character of that mining was?

A. Well, the character of that mining has been the same as the character of mining in any of the Anaconda Copper Mining Company's mining.

Q. How long has it been in effect in the city of Butte as far as you know?

A. Since 1910.

Mr. Maury: Just a moment. The question of care or lack of care is not in the case and we shall object to any cross-examination going in that direction.

The Court: Well, it seems to me that your direct examination went extensively into mining opera-

tions in the Emma ground. The objection will be overruled.

Mr. Maury: We wish to preserve our point of law.

Q. (By Mr. Dwyer): What is the method generally? Explain to the jury how you mine ore in Butte and what you do with the excavation.

A. The method of mining is to sink a shaft in the area where you are intending to mine and to run cross-cuts out from that vertical shaft where you cut the vein and explore that by drifting along the vein and then run raises up from those drifts and later take out the ore between the raises in what are called stopes. [297] As your stoping progresses, waste is introduced into the stopes from the development work and all stopes are filled underneath the mining floor at all times. That is done for several reasons, the principal one is to protect the miner and workman from the caving of the ground and unsafe conditions. One other reason is to support the levels above to the surface, above that. That filling is introduced through the raises that have been run prior to the stoping and all excavations are filled between the levels.

Q. Is that true in the operation of the Emma Mine, by the operation of the Anaconda Copper Mining Company?

A. That is the program method used in the Emma Mine.

Q. What is the custom in the Butte district with reference to the amount of surface ground that is left above the workings?

(Testimony of William A. O'Kelly.)

Mr. Maury: We object; that is not material and it is outside the issues and not proper cross-examination.

The Court: Overruled.

Mr. Maury: We except.

A. In the case of the Emma area, we haven't mined, the Anaconda Company has not mined any stopes above the 200 level in a large part of the area, and in a large part of the area not above the 300 level.

Q. Now explain to the jury, taking this exhibit which is marked 20B and say whether the 200 foot area is from the topmost workings to the surface of the ground? A. It is.

Q. So that, in the Emma district you have no mining closer to the surface of the ground than 200 feet? [298]

A. There are a few small excavations but no stopings and no workings of any size anywhere.

Q. What is the small excavation?

A. It might be an excavation in a raise 13 by 7, or some such as that.

Q. Explain to the jury what a raise is?

A. Well, a raise is a working that is run from one level to the next level and is used for lowering timber and supplies into stopes that adjoin those raises; and also to introduce filling into those stopes and they are kept open during all the period of mining adjacent to those raises.

Q. Would you say "kept open"?

(Testimony of William A. O'Kelly.)

A. They are not filled along with the stopes until the stope has been finished.

Q. What is done to keep them open?

A. They are timbered.

Q. Would you compare them to a shaft or a well?

A. Yes, the walls are supported in such manner that they won't cave together any or slough off, and they are lined with boards so that rocks won't fall down on the miners working there.

Q. What has been the experience in this district with reference to subsidence of surface where the 200 foot mass of solid rock is left above the opening, or the highest workings?

A. Where they were no faults present, the 200 foot block of solid rock between the top workings and surface would prevent subsidence of the surface.

Q. Could the subsidence which you have described [299] along the escarpment of the Emma have been foreseen by any ordinary methods known to mining at that time?

Mr. Maury: To which we object as incompetent, irrelevant and immaterial and not within the issues of this case.

The Court: Overruled.

Mr. Maury: Exception.

A. Well, I think not, because it wasn't anticipated and it was first noticed at the time the manganese mining was started, which was many years after the mine had been worked for zinc ore.

(Testimony of William A. O'Kelly.)

Q. What if anything was done following the observation of this subsidence along the middle fault with reference to the method of mining?

A. After discovering—regarding some method of timbering, speaking of movement along the middle fault, it was decided to introduce a new type of filling which was composed of sand and water, which since that time has been placed in all of the openings that are not in use, including drifts and cross-cuts and raises to the extent of nearly a half million tons of that material at this time.

Q. Hauled in from outside sources?

A. Hauled in from gravel pits in the area.

Q. State whether or not any other precautions were taken to prevent this movement?

Mr. Maury: Our same objection.

The Court: Overruled.

Mr. Maury: May that be considered to go to all this line of testimony? [300]

The Court: It may be so considered.

Mr. Maury: And we take an exception.

The Court: Very well, the exception is granted.

A. (Continuing): Another thing that was decided on at that time was to mine portions of the vein and leave other portions unmined for some time until the filling had become solidified like cement or concrete and would support the movement of other areas later. So that, we are not at the present time mining continuously along the vein.

Q. To what period of operation did you ascribe the movement of the middle fault with reference to

(Testimony of William A. O'Kelly.)

change in filling, with reference to period of time?

A. I ascribe the movement of mining of large quantities of manganese ore in veins which were parallel to the zinc veins.

Q. I don't think you understood my question.

(Question read.)

A. Well, movement along the middle fault started to my knowledge around 1941, and the filling started in October, 1942, the sand filling.

Q. What have you got to say as to whether or not subsequent movement if any along there was due to the mining before the filling was placed in there?

A. It has been our experience in Butte that some squeezing of old workings is continuous. There has been some slight squeezing and movement in that area from old workings, and although not great, has been continuous from that cause.

Q. Beginning with the operation of the manganese, [301] of the mining in getting out manganese, would you say the movement has been the result of that operation before the fill?

A. I don't quite get your question.

Q. Before the method of filling started with the time when you started to mine manganese for the government for the war effort, would you say that the subsidence which you noticed in that area has resulted from the mining which was made at the beginning of the extraction of manganese up to the time you changed the method of filling?

(Testimony of William A. O'Kelly.)

A. I think there was subsidence from the mining of manganese and coincidental with the movement along the middle fault.

(Whereupon a recess was had until 2:30 o'clock April 3, 1947, at which time the trial resumed with W. A. O'Kelly on the stand for further cross-examination by Mr. Dwyer.)

Q. (By Mr. Dwyer): Mr. O'Kelly, you were asked about fault fissures. I don't know whether the jury has a fair understanding of that or not. Will you define a fault as a plane of movement in the earth? A. Yes.

Q. And you referred to the Continental fault. Will you explain to the jury a little bit more about the Continental fault, what it is and whether it is evident?

Mr. Maury: I think that is some distance from this case.

The Court: It was gone into in the examination in chief. Overruled.

A. We call it the Continental fault because of its size. In other words, it can be traced for many miles across the country. The whole crust of the earth is full of such faults, contains faults of that sort; many are just a few miles apart and many are hundreds of miles apart; but blocks bounded by faults are the chief make-up of the crust of the earth and they are moving all the time, in geological language. The Continental as we call it was at one time the valley at the top of the Woodville mountain, and the valley up there was the same elevation

(Testimony of William A. O'Kelly.)

as the valley down here below Butte, and this fault has dropped this whole country down about 1500 feet in relation to the valley at Woodville.

Q. Now, take the middle fault, if you were to build a house on top of that fault, what are the probabilities that the house will ultimately be cracked or broken?

A. The house might be injured during a man's life-time and might be injured several times by movement of that fault caused by earthquake, or crustal movement. It might not be hurt during thirty or forty years by chance moving, but it would stand a good chance of having something done to it if it were astride the fault at the surface.

Q. That movement may be up or down in relation to the blocks on each side, or horizontal in relation to these blocks?      A. That is right.

Q. In other words, you might have, assuming this [303] was a fault between these two desks, you might have one of these desks slip endwise of that fault and drop down or raise up?

A. That is right, and we know that by a study of the faults in the mining area; we know that has happened.

#### Redirect Examination

By Mr. Maury:

Mr. Maury: I have some questions I should probably have asked on direct which I would like to ask now.

The Court: Very well.

(Testimony of William A. O'Kelly.)

Q. Mr. O'Kelly, has the Butte Copper and Zinc Company maintained a resident engineer here during the years the Anaconda Company has been working the mine?

A. I am not sure of that.

Q. Do you know Mr. Sam Barker?

A. Yes, I do.

Q. Is he in the employ of the Butte Copper and Zinc? A. Not to my knowledge.

Q. What, in the way of progress reports, are opened to the Butte Copper and Zinc Company, and the progress maps of the Emma mine?

A. While I have not received any instructions except in the case of Mr. Barker, occasionally he has access to the maps.

Q. And whenever he asks access to the maps, it is given? A. Yes.

Q. How long has that course been followed?

A. Well, so far as I know, since the Anaconda Company started mining the Emma mine.

Q. And has he access to the mine on request?

A. I think he has.

Q. Whenever he requests to go underground, if it was during reasonable hours, it would be permitted? A. I think so.

Q. And to any part of the mine?

A. I think so.

#### Recross-Examination

By Mr. Dwyer:

Q. Do you know whether or not, as a matter of fact, he has been in the Emma mine?

(Testimony of William A. O'Kelly.)

A. I have not been with him in the Emma mine but I heard he has gone into the Emma mine.

Q. Of your own knowledge, you have never been with him and never have seen him down there, is that true?

A. No, I think I have never seen him in the mine.

Q. Do you know what periods that he did go into the mine?      A. No.

Q. Whether it was a year ago or ten years ago?

A. No. I know that he has been in the office and has examined the records over a long period and that is all I know personally of his connection with the Butte Copper and Zinc.

Q. What do you mean by "records"?

A. The stope maps, such as we have furnished.

Q. The same maps we have furnished here?

A. That is right.

Q. Has he ever given any orders or direction in the [305] operation of that mine?

A. Not that I know of.

#### Redirect Examination

By Mr. Maury:

Q. How often does he come—you said frequently—how often has he come to see the records?

A. I would say maybe four or five times a year.

Q. And for how many years?

A. Well, since, to my knowledge, since 1931.

(Witness excused.)

Mr. Maury: We rest.

Mr. Finlen: If the Court please, comes now the defendant, the Butte Copper and Zinc Company, a corporation, at the close of the plaintiff's case, the plaintiff through her counsel having announced in open court that the plaintiff rested, and moves the court for an order to strike all of the witness Plummer's testimony relative to the water main leak on January 29, 1940, on Placer street south of Platinum street, on the ground and for the reason the evidence is incompetent, irrelevant and immaterial.

Second: On the further ground and for the further reason that the evidence does not tend to prove or disprove any issue in this case.

Third: Upon the ground and for the reason that no cause has been ascribed for the leak, no evidence given on which a conclusion as to the cause could be properly predicated.

And renews the same motion upon each and upon all of [306] the grounds mentioned in the preceding motion with reference to each leak concerning which the witness Plummer testified.

And renews the same motion on the same grounds with reference to each leak testified to by the witness Doran; and defendant hereby moves to strike the testimony of the witness Poague relative to plumbing leaks which the witness testified occurred at her property, upon the grounds mentioned in the foregoing motions and upon each of said grounds; and hereby moves to strike the testimony of the wit-

ness Strasburger with reference to the leak which he testified as occurring on Placer street at the property adjoining the Nelson property; and it makes the same motion with reference to the testimony of the leak testified by the witness Strasburger as having occurred at Idaho and Porphyry street, and with reference to the two last motions specifies as additional grounds the reason that there is insufficient evidence it appears from the testimony of the witness upon which the witness could predicate a conclusion as to the cause of each of the two said leaks.

The Court: Ladies and gentlemen of the jury, there is a matter which has been presented to me for a legal ruling which properly should be made outside of your presence at this particular time as it may require some particular discussion; so you will, in company with the bailiff, go out in the hall and hold yourself in readiness to return at call.

(Jury retires from the court room.)

Mr. Finlen: I would like to specify an additional ground to the motion originally made and that is with reference to the remoteness of time and place of the matters testified to, as being too remote.

Mr. Maury: I submit it is the duty of counsel moving to strike out, to specify exactly what is relevant and what is irrelevant and what is admissible and what is unadmissible.

Mr. Finlen: In the interest of time, if the Court please, I have made one motion and then the remainder is predicated upon the reasons stated in

that, but I can go through each one of these slips and object separately to each leak reported, if that would be any benefit to the Court, or improve the record. I'll say this: that if an expert who had sufficient knowledge upon which to predicate a conclusion had examined the pull or telescoping pipe and had given it as his qualified opinion that that pulling or telescoping was due to ground movement, we would be confronted by an entirely different question.

The Court: It is my opinion that the motion to strike the testimony of Mr. Plummer as to the condition of the water pipes and the necessity of repairs during the period of time that he testified to is well taken and due to the nature and condition of his testimony and the length of time of his testimony, it would be in my opinion for me impossible to intelligently separate what I consider being the incompetent from the competent and to charge or admonish the jury in such a way that it would be intelligible to the jury or would assist them in arriving at their decision in the case, or [308] would satisfy me in so doing they had not considered the evidence that I believe incompetent, for that reason the Court grants the motion as to the testimony of the witness Plummer.

Mr. Maury: Note our exception.

The Court: Note an exception.

As to the testimony of Mrs. Poague as to the leaks in the water pipes where she herself observed, and as to the repairs, and as to the repairs and

necessity of the repairs, the motion to strike is denied. As to the testimony of Mr. Strasburger as to the conditions that he personally observed and testified to with reference to the opening or excavations in the city streets in the area he testified to by the Butte Water Company and the fact that those excavations were filled with water that came from the water mains of the Butte Water Company, the motion of the defendant to strike that testimony is denied.

Mr. Finlen: There are two specific leaks that I moved with reference to the testimony of Mr. Strasburger concerning gas leaks and the Court has made no ruling concerning the various reports by the witness Doran.

The Court: With reference to those leaks, the motion is likewise denied—the gas leaks.

(The jury returns to the court room.)

The Court: As you heard, the Court has been requested to strike from the record as evidence in the case the testimony of Mr. Plummer who appeared here before you, the manager of the Butte Water Company and who testified as to leaks in the water mains of the [309] Butte Water Company and as to the condition of the pipes in the area that is involved in this case over a period of years. The Court has granted that motion and you are not in deciding this case or in arriving at your verdict, you are not to consider his testimony or the testimony as given by him as to the condition of the water pipes in any way whatsoever. You are to the

best of your ability to exclude that testimony from your minds and to consider the case as though he was never here. Now the reason for that is this: as you recall his testimony extended over a period of years and it appeared quite certain from his testimony that some of those leaks were caused through natural processes, through changes in the pipe and the wear in the pipe itself. There was other testimony given by him from which it might be determined by you, if you believed it, and if you believed the testimony of other witnesses, that as to some of the pipe damage that he testified to, that it might have been or was caused by ground movement. However, the two classes of evidence were in no way segregated or separated, and where it appears that part of the evidence is good and part is bad, why then of course the bad can not remain in the case and the good just goes out of the case with the bad. So you will disregard that in arriving at your verdict in this case.

Mr. Finlen: We ask an exception be given to the statement of the Court that part of the evidence was good and part was bad.

The Court: I mean to say, if there was evidence there you found was good or bad is a question for you. [310]

JOHN H. CURTIS, JR.

called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Dwyer:

Q. State your name to the Court and jury?

A. John H. Curtis, Jr.

Q. Where do you live?

A. In Butte, Silver Bow County, Montana.

Q. How long have you lived here?

A. I was born here—64 years.

Q. Are you familiar with the locality of the Poague home? A. Yes.

Q. Do you live anywhere near there?

A. Yes, three blocks away from there.

Q. What is your business, Mr. Curtis?

A. Real estate.

Q. Have you bought and sold property in the city of Butte? A. Yes.

Q. Have you familiarized yourself with the market value of properties in this city?

A. Yes.

Q. Over what period of time has your experience in that line extended? A. Since 1903.

Q. Have you examined the property of the plaintiff in this action, Nellie Poague? A. Yes.

Q. Do you know Mrs. Poague? [311]

A. Yes.

Q. And do you know where she lives?

A. Yes.

(Testimony of John H. Curtis, Jr.)

Q. Have you seen her property? A. Yes.

Q. Have you examined it with a view of ascertaining its reasonable market value?

A. Yes.

Q. State under what circumstances you did that?

A. Well, I was one of a committee of appraisers from the realty board to go down, and we went over the place the three of us, Mr. Redlich, Mr. Wulf and myself.

Q. Now, assuming that this property had not been damaged in any way except from ordinary wear and tear, in other words that there had been no injury by ground movement of any kind, what would you say the market value of that property was or is at this date?

A. Well, I think you might be able to get \$4,500.00 for it.

Q. That would be the market value?

A. Yes.

Q. That is, assuming no damage other than ordinary wear and tear? A. Yes.

Q. What salvage value has the property now in your opinion?

A. About \$250.00 salvage.

#### Cross-Examination

By Mr. Maury:

Q. Have you had experience in salvaging? [312]

A. No.

Q. As to buying and selling realty you have had experience? A. Yes.

Q. And you have lived in that neighborhood or

(Testimony of John H. Curtis, Jr.)

within two or three blocks of that neighborhood all of your life?      A. Yes.

Q. Whereabouts, what street do you live on?

A. I live on the corner of Washington and Porphyry.

Q. And that is somewhat northwest or west of this property?

A. That would be west and slightly north.

Q. Mr. Curtis, would you say that real estate values have risen in Butte in the last few years? Would you say that the cost of building has risen?

A. Yes.

Q. And can you give some proportion, some percentage of its rising in the last five years in Butte?

Mr. Dwyer: Objected to as not proper cross-examination. This witness was interrogated as to the market value of the property and not the cost of construction.

The Court: Overruled.

A. Well, when we are writing insurance, we raise it forty per cent more, and right now I guess it is a little worse than that.

Q. I don't understand exactly—material and labor forty per cent more than five years ago?

A. Yes, I would say so. [313]

Q. And what is the reason for that raise in the neighborhood?

A. Yes. The cost of material and cost of labor has risen.

Q. But you would not say that there has been a

(Testimony of John H. Curtis, Jr.)

rise in the cost of labor and the cost of material, I mean building materials and building labor in Butte in the last five years to an extent of forty per cent or fifty per cent? A. Yes, there has been.

Q. And that it has affected the value of improvements such as this?

A. Well, this is an old house.

Q. This is an old house and yet in your opinion it would be worth \$4,500.00 if it were not injured?

A. Yes.

Q. Now, did you examine and see what injuries had been done to the property?

A. Yes, I think so.

Q. You went all through it? A. Yes.

Q. And went through the garage?

A. Yes. So far as going through the garage, she wouldn't let me go clear in.

Q. Why?

A. I guess she didn't want me to get hurt. The garage is pretty badly gone.

Q. And by "pretty badly gone" what do you mean? A. You can't use it.

Q. It is worthless? [314]

A. And in the house there is cracks in the plaster and the doors are jammed a little bit, that is about all you can notice there; but the garage is worse.

Q. Is the house on a line with the cracks in the garage, east and west? A. Yes.

Q. Have you noticed in the district close to

(Testimony of John H. Curtis, Jr.)

where you live on business a progressive nature of such cracks?

Mr. Dwyer: We object to this as improper cross-examination.

The Court: Sustained.

Q. Who requested you to go down there?

A. The Company; they had three of us go down.

Q. Who were the other two?

A. Mr. Redlich and Mr. Wulf.

Q. That is John Wulf?      A. Yes.

Q. And what is Mr. Redlich's name?

A. Roy Redlich?

Q. They live here in Butte?      A. Yes.

Q. Did you three consult there?      A. Yes.

Q. And mentioned the various features of value or lack of value?      A. Yes.

Q. And will you tell us how you arrived at any salvage value at all?

A. Well, it was more or less a guess, the figure we arrived at. [315]

Q. Did you figure how much it would cost to take it down?      A. No.

Q. Did all three of you finally, after talking it over together, come to the same conclusion?

A. We figured to.

Q. And they all are real estate men?

A. Yes.

Q. And experienced here in Butte?

A. Yes, sir.

Mr. Maury: That is all.

(Testimony of John H. Curtis, Jr.)

### Redirect Examination

By Mr. Dwyer:

Q. You all three made a report?

A. Yes, we made a report, a written report.

Q. Does that report differ from your testimony here or was it the same?

A. The same figures, \$4,500.00 less \$250.00 for salvage.

Q. Mrs. Poague is still living in the house?

A. Yes.

Q. And it is livable? A. Yes.

(Witness excused.)

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### C. C. GODDARD

called as a witness on behalf of defendant, being duly sworn, testified as follows: [316]

### Direct Examination

By Mr. Dwyer:

Q. State your name to the Court and jury?

A. C. C. Goddard.

Q. Where do you live, Mr. Goddard?

A. 725 Maryland.

Q. How long have you lived in Butte, Silver Bow County? A. Steady since 1892.

Q. What has been your business?

A. Builder.

(Testimony of C. C. Goddard.)

Q. Contract builder?      A. Yes, sir.

Q. Are you familiar with the property owned by Mrs. Poague, the plaintiff here?      A. Yes, sir.

Q. What, if any, work did you do for her?

A. I built a garage in the rear of her lot.

Q. Have you examined that garage lately?

A. Yes, sir.

Q. Is that the same one you built?

A. Yes, sir.

Q. State whether or not you made a record of the amount paid to you by Mrs. Poague?

A. I did.

Q. Have you got that record?

A. Yes, sir.

Q. When was it made?      A. In July, 1925.

Q. Was that the time of building? [317]

A. Yes.

Q. Will you produce the record? (Witness does). In whose handwriting are the entries in that record?      A. They are mine.

Q. Do they correctly show the amount paid to you by Mrs. Poague?      A. Yes, sir.

Q. What did she pay you? What was the total amount she paid you for building that garage?

A. \$1,297.60.

Mr. Dwyer: You may cross-examine.

#### Cross-Examination

By Mr. Maury:

Q. Did she pay you anything or was it Charles Poague?

(Testimony of C. C. Goddard.)

A. Charles Poague did the paying.

Q. She didn't pay you anything at all, did she?

A. I don't think so.

Q. Now, when was that garage built?

A. In July, 1925.

Q. You are still connected with the contracting business, or not?

A. Well, not active right now, no.

Q. You are somewhat acquainted with values of materials that are necessary for contract work?

A. How is that?

Q. You are still conversant with the values of materials that are used in work of that nature?

A. Yes.

Mr. Dwyer: We object to that as not proper cross-examination. [318]

The Court: Overruled at this time.

Q. Mr. Goddard, how do the prices of building materials and labor compare now with what they were in 1925 in Butte?

Mr. Dwyer: We object to that as incompetent, irrelevant and immaterial. This witness was put on for the purpose of impeaching the testimony of the witness Poague.

The Court: Sustained.

Q. Mr. Goddard, is one your sons in the geological department of the Anaconda Company?

A. Yes, sir.

Q. How long has he served in that department?

A. Why, I don't know. He got through the School of Mines in 1927 and I think he has been with them all the time and before that.

(Testimony of C. C. Goddard.)

Q. Your dealings with Mrs. Poague were not with her but with Charlie in the building of that garage?

A. Yes, I talked with both of them.

Q. Who paid you the money?

A. As I remember, the husband paid me the money, but I would not be sure about that.

Q. Let me see that record, please. (Witness produces record). Is that the entire record?

A. That is all, yes.

Q. When was that record made?

A. July 10, 1925.

Q. When was the writing, "Progue, John" put there?

A. It was put there at that time. [319]

Q. What is this on the opposite page?

A. That is some little job I did. It has not anything to do with that.

Q. What is the first item here on the page under "Progue"?

A. That is about the first part. The first part was to be 18 by 20 and it figured at this amount. (Indicating).

Q. No, what is the first item there on the first line, what was that for?

A. 14 by 18 by 3 to dig thirty yards \$75.00.

Q. What was the next?

A. Fourteen yards concrete foundation \$112.00.

Q. And the next?

A. Forms, 2,000 feet of lumber, \$140.00.

Q. And the next?

(Testimony of C. C. Goddard.)

- A. 360 feet of basement flooring, 25 cents, \$90.00.
- Q. Was that the price of the basement flooring?
- A. Yes, at that time.
- Q. Now what was the next?
- A. 2,000 feet of framing lumber, \$150.00.
- Q. Was that window frames?
- A. No, rough lumber. That is the price installed.
- Q. What is the next?
- A. Four squares of roofing, \$28.00 installed.
- Q. Was that the price of that?
- A. Installed, yes.
- Q. What is the next?
- A. There was a step up on the side, a little stairs, \$25.00. [320]
- Q. And the next?
- A. Two sets of garage doors, \$100.00.
- Q. The next item?
- A. Those are ordinary doors, two ordinary doors, \$40.00.
- Q. And the next? A. Hard crush, \$30.00.
- Q. And the next? A. One coal chute.
- Q. And the next? A. 12,000 brick, \$360.00.
- Q. And the next item? A. Total, \$1,170.00.
- Q. What is the next item?
- A. Making the building 20 by 20 I added \$100.00 and made it \$1,270.00
- Q. What is the matter along here?
- A. Six feet of chimney \$9.00.
- Q. And the next?
- A. Extending foundation \$10.00.

(Testimony of C. C. Goddard.)

Q. And the next item?

A. One Yale lock \$3.25.

Q. And the next?

A. Four sacks of sand \$3.60.

Q. And the next?      A. One yard of rock.

Q. Does the word "labor" appear anywhere on here?      A. These prices include all labor.

Q. I asked you if the word "labor" appears?

A. No, I don't figure that way. [321]

Q. The word "labor" doesn't appear?

A. No.

Q. And you have no memory at this time what the labor on the building was?

A. My time book would show that.

Q. Where is your time book?

A. If I could find it,—I don't know as I could get it—I probably could find it though.

Q. In so far as this record can refresh your memory, there is nothing to show what labor there was?

A. Yes, everything is to show; there is brick \$360.00 at that price brick was ten dollars a thousand; there was \$120.00 for the brick; then we have mortar \$24.00 more and the balance would all be labor.

Mr. Maury: That is all.

(Witness excused.)

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Mr. Finlen: The defendant rests.

The Court: Any rebuttal?

Mr. Maury: No. The plaintiff rests.

Mr. Finlen: The defendant would like to make a motion.

The Court: Ladies and gentlemen, there is another matter to be presented to me, so you may step into the hall and hold yourself ready to return at the call of the Court.

(Jury retires.) [322]

Mr. Finlen: Comes now the defendant, Butte Copper and Zinc Company, a corporation, and moves the Court for an order directing a verdict in favor of the defendant and against the plaintiff upon the following grounds and for the following reasons:

1. That there is no evidence to support a verdict in favor of plaintiff and against the defendant.
2. That there is no evidence to support a judgment in favor of plaintiff and against defendant.
3. That there is no evidence that defendant by itself or by or through any agent, servant or partner has done underground mining which caused any damage complained of, and that there is no evidence that defendant as lessor is liable for or did or caused any damage complained of.

The Court: The motion will be denied.

Mr. Finlen: Exception.

Whereupon an adjournment was had until Monday, March 7, 1947, at 10:00 o'clock a.m., at which time the trial resumed.

The Court: Let the record show that after the completion of all of the evidence in the case and prior to the commencement of the arguments in the case, the Court announced its rulings as to the instructions tendered the Court by each of the parties herein and [323] requested to be given as follows:

The Court proposes to give instruction number two of the plaintiff as amended by the court in striking out the word "apexing," the fourth word in the eleventh line of the instruction; the Court proposes to give instructions 3, 5, 9 and 10 proposed by the plaintiff, and the instruction just handed to the Court by the plaintiff that the Court now numbers 11. Does the defense have any objection or exception to the Court in giving any or all of these proposed instructions?

Mr. Dwyer: The defendants object and except to the giving of instruction number two as tendered by the plaintiff and modified by the Court on the ground and for the reason that *if* makes defendants liable in this action without any proof that the defendant did any mining, supervised any mining or did any act or thing or supervised any act or thing either by itself or through any agent which resulted in damage to the property of the plaintiff.

The Court: The objection is overruled.

Mr. Dwyer: The defendant objects and excepts to the giving of instruction number three offered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it permits the jury to find from the evidence that the

defendant did actual mining on the premises in question, the evidence being entirely to the effect that the defendant did no mining and that all of the mining was done by the Anaconda Copper Mining Company.

The Court: The objection is overruled. [324]

Mr. Dwyer: The defendant objects and excepts to the giving of instruction number 5 as offered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it instructs or attempts to instruct the jury on matters that are not in issue in this case, there being no evidence of damage to neighboring property which affected the value or interest of the plaintiff and the value of the plaintiff's property in this case. For the further reason that it assumes that the defendant did actually conduct the mining on the property, when the evidence is all to the effect that the defendant did no mining. The rule of law being that in a case of subsidence to property due to mining the person who actually does the mining is the one who is liable for damages.

The Court: The objection is overruled.

Mr. Dwyer: The defendants object to the giving of instruction numbered 9 as tendered by the plaintiff and proposed to be given by the Court on the ground and for the reason that the evidence conclusively shows that no act of the defendant caused any damage to the property of the plaintiff herein; that the mining was done under a lease, the rule being that the person operating the lease is liable for surface damage caused by its mining operations

there being no evidence in this case to connect the defendant in any way with the management or operation of this lease.

The Court: The objection is overruled.

Mr. Dwyer: The defendant objects and excepts to the giving of instruction numbered 10 offered by the [325] plaintiff and proposed to be given by the Court on the ground and for the reason that it is based on the assumption that the defendant is liable for the damages sustained by plaintiff in this case, when the evidence shows that the damage was caused by the lessee under its lease from the defendant.

The Court: The Court will withdraw instruction number 10 proposed on behalf of the plaintiff and in its place will give instruction numbered 7 proposed on behalf of the defendant.

Mr. Dwyer: The defendant excepts and objects to the giving of instruction numbered 11 as tendered by the plaintiff and proposed to be given by the Court on the ground and for the reason that it assumes that the jury may find against the defendant for acts which were not performed by it; and further allows interest in the case where interest should not legally be allowed.

The Court: The objection will be overruled.

Mr. Dwyer: We note an exception to the ruling of the Court in each instance.

The Court: Yes, the defendant is granted an exception to the ruling of the Court in each instance.

The Court will refuse to give instructions 1, 4, 6, 7, 8 and 10 proposed by the plaintiff.

Mr. Genzberger: To each and all of said refusals separately and respectively, the plaintiff excepts.

The Court: The exception will be noted. The Court proposes to give instructions numbered 6, numbered 7, numbered 8, and numbered 9 as modified by the Court by inserting after the word "not" on line 3, the words [326] "of itself," so as to make the instruction read "the cost of repairing or rebuilding the plaintiff's house and garage does not of itself prove or establish the market value" of the property;—numbered 10 and numbered 11 proposed by the defendant. Does the plaintiff have any objection or exception to the giving by the Court of these instructions or any of them?

Mr. Genzberger: No exception.

The Court: The Court refuses to give instructions numbered 1, 2, 3, 4, 5, 12, 13, 14, 15, 16 and 17 proposed by the defendant. Has the defendant any objection or exception to the action of the Court in that regard?

Mr. Dwyer: The defendant excepts to the ruling of the Court not giving instruction numbered 1 offered by the defendant and refused by the Court on the ground and for the reason that the evidence fails to show that the defendant Butte Copper and Zinc Company, was liable for any damages to the plaintiff's property, the evidence being conclusively to the effect that the damages were caused by mining conducted by a lessee and that no direct supervision of the mining was exercised by the defendant and

that no knowledge of the condition existing of the damages resulting from the mining was had by the defendant.

The Court: The objection and exception is overruled and exception is noted.

Mr. Dwyer: The defendant excepts to the refusal to give instruction number 2 offered by the defendant and refused by the Court on the ground and for the [327] reason that there is no evidence showing what caused the gas explosion, or that any act of the defendant was responsible for any of these gas explosions and that a consideration of these explosions in the present case would cause the jury to speculate on the probable cause where no evidence was given as to what the direct cause of the explosions were.

The Court: Overruled and exception will be noted.

Mr. Dwyer: The same objection and exception will be made by the defendant in regard to the Court's ruling in refusing to give instruction numbered 3.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 4 as tendered by the defendant on the ground and for the reason that it is a correct statement of the law of the case and that it is not covered by any other instruction offered in this case.

The Court: The objection will be overruled and exception will be noted. The Court intends to charge

the jury that they have a right to determine and take into consideration the interest of any witness testifying as to the outcome and the relationship to either of the parties of the action.

Mr. Dwyer: The same objection will be made to instruction numbered 5 as tendered by the Court unless the Court intends to cover that also.

The Court: Yes, that will be covered.

Mr. Dwyer: With that understanding, we have no [328] exception. The defendant excepts and objects to the refusal of the Court to give instruction numbered 12 as tendered by the defendant on the ground and for the reason that there is no evidence in this case showing any responsibility of the defendant Butte Copper and Zinc Company for the damages which are alleged to have been sustained by the plaintiff.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 13 as tendered by the defendant on the ground and for the reason that the plaintiff in this case and the theory of this case is based on the act of mining operations of the defendant, by itself or through an agent, and the evidence being conclusively to the effect that the defendant did not conduct any mining operation either by itself or through an agent, and there is a complete failure of proof in that regard in the case.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal of the Court to give instruction numbered 14 tendered by the defendant on the ground and for the reason that there is no evidence which showed the nature of the plumbing repairs for which the bills in evidence were contracted; there is no evidence showing what caused the break which necessitated the repairs and damage if any of the plumbing in the plaintiff's house, the cause of this damage not being shown by the evidence and the [329] jury would have to speculate and assume that the defendant was responsible for it.

The Court: The objection will be overruled and an exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal to give instruction numbered 15 as tendered by the defendant on the ground and for the reason that it relates to an issue upon which no evidence was received in this case; it is not a proper element of damage under the complaint or the evidence in this case; there is no testimony relating to that matter and the jury would under the evidence in this case not be in an position to judge whether or not it was necessary to raze the building, or what the cost of filling the excavation would be. The instruction further assumes that the defendant would be liable for such costs even though it had nothing to do with the operations that caused the damage if any.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the re-

fusal of the Court to give instruction numbered 16 tendered by the defendant on the ground and for the reason that the law is to the effect that a lessor is not obligated to place restriction in an ordinary lease. There is no duty upon the lessor, the defendant in this case to place any such restrictions in its lease to the Anaconda Copper Mining Company, it being agreed that the lease shows that the Anaconda Copper Mining Company was required to conduct mining operations in a workmanlike [330] manner.

The Court: The objection will be overruled and exception will be noted.

Mr. Dwyer: The defendant excepts to the refusal to give its instruction numbered 17 on the ground and for the reason that the theory of this case and the complaint in this case alleges a value of \$500.00 on the plaintiff's property.

The Court: The objection will be overruled and exception will be noted.

The instructions that the Court has given and that were proposed by each of the parties were numbered. The Court has not changed the numbers but after the number on each instruction the Court has added the letter "P" to indicate that the plaintiff was the one that was proposing that instruction; and after the number on those proposed by the defendant the Court has added the letter "D" to indicate the instructions that were proposed by the defendant.

Now, further, gentlemen, and so that you may be advised as to the idea of the law that the Court has that is controlling in the case, the Court proposes to charge the jury as follows:

If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the [331] knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.

Does the plaintiff have any objection to the proposal of the Court in giving that instruction?

Mr. Maury: We have no objection.

The Court: Does the defendant have any objection?

Mr. Dwyer: The defendant objects to the giving

of such instructions as proposed by the Court on the ground and for the reason, one: that it assumes to make the lessor liable for the actions of the lessee, and there is no evidence of consent on the part of the lessor to the damages if any resulting from the mining.

For the further reason that the instruction takes in the period of 1917 to the date of the filing of the complaint, the evidence being that the first observable damages from mining occurred in 1943, and the original lease being terminated in 1940, and the lease under which the present operations are conducted was given in [332] the year 1940 and before any evidence of any damage occurred in the leased premises.

The Courts: The objection will be overruled and an exception will be granted.

Mr. Dwyer: Counsel called my attention to an ambiguity in my objection where I said, "The evidence showed no consent to damages." The objection should be to the effect that the defendant did not give its consent or have knowledge of any method of mining which resulted in injury.

The Court: Very well; the objection as additionally made will be overruled and exception will be noted.

(Jury returns to the court room.)

The Court: Proceed with the opening argument.

Mr. Finlen: We ask the Court at this time for an order permitting the jury a view of the Poague property.

Mr. Maury: I don't think we will object to it if it is convenient to the marshal and everybody.

The Court: Let the record show that the defendant in the action requested that the jury be permitted to view the property which is the subject of the litigation; that counsel for the plaintiff were in accord with the request, and that in the opinion of the Court it is proper for the jury to have a view of the property which is the subject of the litigation and of the places at which any material fact occurred, the Court orders that the jury be conducted in a body under the charge of the bailiff of the Court, one person representing each party, to the place which shall be shown to them by the two counsel who are present. [333]

Now, ladies and gentlemen of the jury, I am going to send you down to view these premises. You will be in charge of the bailiffs and no person other than the two counsel, one representing each side, will accompany you there, shall speak to you on any subject connected with the trial or upon any of the matters connected with the subject of the action. You, of course, may talk with each other, but no other person except the two counsel may speak to you about any matter but they may point out to you the property in litigation and all of it that you desire to see. And in that connection, ladies and gentlemen, while you are absent from the court room, I want you to bear in mind the admonition that I have given you particularly with reference to forming or expressing any opinion as to the merits of the case.

Mr. Genzberger: What is the ruling of the Court with reference to any surrounding property damaged in the neighborhood?

The Court: No, the view here will be confined to a view of the property of Mrs. Poague and any portion of the structures thereof.

Mr. Maury: May the Emma shaft be pointed out?

The Court: Yes, the Emma shaft may be pointed out to the jury.

Mr. Genzberger: And the Garfield School site?

The Court: No, the shaft is the only thing aside from the view of the premises of Mrs. Poague itself which may be pointed out to the jury in the case.

(Whereupon, the bailiffs were duly sworn by the clerk and instructed by the Court.)

(Whereupon, a recess was had until Monday, April 7, 1947, at 2:00 o'clock p.m., at which time the trial resumed with arguments of counsel for plaintiff and defendant.)

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The Court: Ladies and gentlemen of the jury, I am about to give you the law of the case. Under your oath you decide any issue in a lawsuit according to the evidence you hear in the courtroom and the law given you by the Court. So you see each one of us has a part to play in the decision of any lawsuit. Your part is to determine what the facts are, what witness you believe, what witnesses you don't believe, and what weight and value you give to

evidence. That is your function, and in that function you are the sole and exclusive judges and I have nothing to do with that at all. Should I express my opinion as to what a fact might be, that opinion does not control you at all. If you think the evidence is different from my view of it, it would not only be your right but your duty to disregard it. Equally it is my function to decide what the law is. I did that from time to time during the progress of the trial. At times you will remember when legal arguments were being made to me I had you leave the courtroom because there I was about to decide a portion of my part of the case, what the law was. I [335] did that without your presence equally as when you go to your jury room to decide what the facts are I don't go there with you. So, it of necessity follows when I tell you what the law is, you accept that as true, you follow it and apply it to the facts to the best of your ability. You have no right to receive any opinion of law from anybody else except myself under your oath and if in some statement I make as to what the law is, you have some preconceived opinion that you might have of the law as told to you by somebody, it would be your duty to disregard it.

Now, this action, ladies and gentlemen, is what is known as a civil action. It is commenced because Mrs. Poague believed that the defendant, through some act violated a legal duty in injuring her property, that the defendant owed her. The action was commenced by filing the amended complaint on the 1st of April, 1946, and in that connection I desire

to charge you that the complaint is not evidence in any degree and it is not to be considered by you as evidence, neither are you to consider that any statement of fact made in the amended complaint is true, or is a fact simply because it appears in that complaint. The complaint serves the function only of succinctly and definitely in writing, stating what the plaintiff claims the defendant did that caused her detriment. That is its sole purpose, so that you and I may understand what the case is about, what charge is made, so that the defendant may likewise understand it and in the event that it contests the [336] truth of the statement of facts, the defendant may prepare to come into Court before the court and the jury and try the case. That is its only function. So you are not to consider it as evidence at all or any statement that is made therein as true simply because it appears therein.

Now, in its essentials, Mrs. Poague's complaint against the Butte Copper and Zinc Company sets out these things she says are facts, that is that since the 8th of December, 1910, she was the owner of certain real property in Butte, Montana; that she had on the real property a brick veneered dwelling consisting of six rooms and bath and central hall, and so forth, and also a brick garage. Those improved structures were hers. That since July of 1917 the defendant by itself or through its servants or partner or agent, Anaconda Copper Mining Company, has by underground mining in the Emma, Czarromah and Nellie quartz lode mining claims wrongfully destroyed and impaired the subjacent

and lateral support that her lands had and that were given to them by nature in its natural state, and that by reason of such mining the land under the buildings and improvements subsided causing damage and injury to the buildings and cracking of the walls and things of that character that are more fully set up in the complaint; that she would be required to expend \$600.00 in removing the debris as she refers to it or alleges in its essentials in the complaint. And further pleads that they are worthless. That except for the subsidence of the ground, her property would have a reasonable market [337] value on the 1st of April, 1946, the date of the commencement of the action of \$7,500.00, but that the mining with the resultant subsidence has destroyed its value and impaired it to the extent that of that \$7,500.00 there is only a salvage value of \$500.00 left, and that she has been damaged in the amount of \$7,000.00.

Now, those are her contentions as set out in her complaint. The truth of the facts are for you. The defendant had the right and did file its answer in this case, and that is its statement in writing required by law, and in that the defendant had an opportunity to admit such of the facts in the complaint that it thought to be true, if it thought any of them were true, or deny any or all of the alleged facts set out in the complaint, if the defendant thought they were untrue, and the defendant in filing its answer has denied those essential facts. Now, equally with the complaint the answer is not of any evidentiary value at all and is not to be considered

by you as such; neither is any facts set out in the answer to be taken by you as true simply because it is there. But the denials of those statements in her complaint raises what we call an issue. The plaintiff, being the plaintiff, she has the affirmative of the issue and the law says that the burden was and is on her to establish the affirmative of the issue, that is the truth of the facts that she sets out in her complaint by a preponderance of the evidence before the jury is warranted in giving her a verdict. That is the law.

Now, when you were first sworn, ladies and gentlemen, [338] there were a number of things essential that she was required to establish by a preponderance of the evidence. One of them was the truth of the fact as she alleged that there was a subsidence of the ground under her building. She was required to prove that by a preponderance of the evidence. Another was that the subsidence of the ground was caused by underground mining in the Czarromah, Emma or Nellie quartz lode. In other words, it wasn't sufficient for her to prove simply that there was a subsidence of the ground, but she was required to prove that the subsidence was caused by the underground mining in the Czarromah, Emma or Nellie quartz lode. She was equally required to prove, ladies and gentlemen, that if there was a subsidence underground that it injured or damaged her property; and she was further required to prove by a preponderance of the evidence the extent or the amount of the damage and the compensation reasonably due her for that damage. Those things

she was required to prove, and the evidence that was received in the case was pointed to prove or disprove those facts and of course it is your duty to view all the evidence and determine whether they have been proven or they have not been proven. It is your duty and your right, ladies and gentlemen, in doing that to also listen to statements of counsel, because the counsel in the case represent their client in court; they speak for their client, and in court they have a right to admit or determine what the fact is by their own admission. Attorneys have that right. And in that connection and in examining the evidence, you [339] have a right to consider the statement that Mr. Finlen, who represented the defendant, made in his argument where he said to you that there was no resistance to the fact that the property was injured by underground mining; that were he on the jury that he would feel that he would come to no other conclusion as a juror. You have a right also to consider statements made in argument to determine the fact that the property of Mrs. Poague has been damaged by that mining operation.

Now, of course, if Mrs. Poague suffered detriment as she claims she did to her property, she has a right to bring an action, for the law is that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault compensation therefor in money which is called damages. And detriment as applied to the issues in this case is loss or harm suffered in property and the measure of the damages causes by such unlawful act or omission of the other is the amount

which will compensate fully for the detriment proximately caused thereby. The term unlawful act or omission as used by me means the doing of an act by one the law forbids to be done, or the failure to do or perform an act by one that the law requires of him to do or perform.

That necessarily requires a statement from me to you, ladies and gentlemen, as to what the law is with reference to what one mining underground may lawfully do or may not lawfully do with reference to the owner of the surface of the property, if the owner of the surface of the property is one other than the [340] person who owns the minerals, as is the fact in this case. In other words, Mrs. Poague owns the surface of the property and the Butte Copper and Zinc Company owns the minerals underlying and adjacent to that property. So there is a divided ownership, and the law in that regard is in this case it has been admitted as a fact that the plaintiff Ella Poague is the owner of the property described in the amended complaint in this case and has been the owner of that property since December, 1910, and you are instructed that it is the law that said plaintiff had and has an absolute right to subjacent and lateral support for the surface of the same and for all of her structures thereon; good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave the ore unmined under, or adjacent to, or down the slope of the vein or veins in the land; it is not required that plaintiff prove that the mining methods were neg-

ligent or unskillful before she can recover; no matter how careful the method employed may have been, if the mining of the defendant underneath the surface of the Emma, Czarromah or Nellie lode claims, or any of them, did disturb the surface of Lot 4 and the north 10 feet of Lot 5 in Block 67, Butte Townsite, and injure the buildings thereon, then the defendant is liable for all the damage to said property proximately caused thereby.

You are further instructed that the plaintiff [341] Ella Poague is entitled under the facts in this case not only to subsurface but to lateral support. Subsurface or subjacent support means support from below. Lateral support is support from the sides all around the building, and if you find from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings has disturbed the plaintiff's surface, or has by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property has disturbed either the lateral support or the subjacent support of plaintiff's buildings, then the defendant is liable to the plaintiff for such disturbance because the law requires the defendant to so conduct its mining operations that the surface is at all times sustained.

Now, it appears as a fact, ladies and gentlemen, from the evidence, or at least that is my opinion that it does appear as a fact, but that is for you and for you to determine if you disagree with me, that the defendant Butte Copper and Zinc Company

did not do the actual work of mining that was done since 1917 but that was done by another, by the Anaconda Copper Mining Company and, ladies and gentlemen, it is the law if you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company has been engaged in mining on the Emma, Czarromah and Nellie quartz lode mining claims with the knowledge and consent of the [342] defendant, the Butte Copper and Zinc Company, a corporation, and as its lessee; and in the course of the mining operation so carried on by said Anaconda Copper Mining Company, a corporation, in the said mining claims did so disturb or withdraw from the surface of the property of the plaintiff the subjacent or lateral support for the said surface and as a direct and proximate result thereof, the surface of the property of the plaintiff subsided and caused injury and damage to the structure and building on the property of the plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all damage you find from the evidence the plaintiff sustained by reason of such mining operations.

Now, I have told you, ladies and gentlemen of the jury, that as to any fact in issue, before the plaintiff is entitled to a verdict at your hands, the burden is on her to prove the truth of her contention as to the facts by a preponderance of the evidence. So, as an illustration it would not be enough for her to prove or for you to believe that she suffered damage. She

must also establish the amount of the damage, because your verdict here will arrive at some kind of an amount, if you find a verdict in her favor. Now, when I say "she must prove it by a preponderance of the evidence," that simply means the greater weight of the evidence. She is not required to produce evidence establishing the truth of her contention beyond a reasonable doubt as in criminal cases. And if after viewing all the evidence introduced you feel that the evidence is evenly balanced, [343] your verdict should then be for the defendant in the case. However, if after viewing all the evidence in the case it appears to you that the evidence is weightier in any degree in establishing the truth of the material allegations of the fact in issue, then the evidence opposing the truth of such material allegations then the evidence as a whole preponderates in favor of plaintiff and she has as a matter of law established the truth of the allegations that is under attention at the time by a preponderance of the evidence.

The preponderance of evidence in this case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It may be established by the testimony of a single witness as against a greater number of witnesses who testify to the contrary if in your mind the testimony of the one witness is entitled to full credit, and in determining upon which side the preponderance of the evidence is, you should take into consideration the opportunity of the several witnesses for seeing and knowing of their own knowledge the things about which they testify, their conduct and demeanor while testifying, their interest or lack of

interest if any in the result of the case, the relationship if any between the witness and the parties to the action, the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial and from all these facts and circumstances proved on the trial determine upon which side is the weight or preponderance of the evidence. [344]

Now, I have talked to you somewhat about witnesses and where there is a dispute the result depends upon the testimony of the witnesses who appeared before you. If there is a dispute as between two, it is your duty to find the fact and you must believe either the one witness or the other. That is your function. You weigh the evidence and you are the sole and exclusive judges of the effect and value of evidence. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case. Now I don't say there that the direct evidence of one witness is sufficient. I say the testimony of one witness entitled to full credit. And that means a witness who you believe and who you think and are confident is telling the truth. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility and the weight and effect to be given his testimony. That means simply this, that when a witness is sworn here to

tell the truth and he goes on the witness stand, the law presumes and you as officers of the court must presume that that witness is going to tell the truth, but you don't know whether as a matter of fact he actually tells the truth or not until you hear his testimony. But you must do more than hear it. He is before you and you must use the faculty of your eyesight to [345] determine this situation. You judge his credibility not only from what he says but the manner in which he speaks it and from not only the words that he says but the way he says it; does he impress you, or she impress you that he or she is telling the truth. You cannot determine that unless you both hear and see the witness. Now, while you are the sole and exclusive judges of the effect and value of the evidence, your power of judging of the effect of evidence is not arbitrary. In other words, you are controlled in your decision by rules of law the same as I am in my part of the decision and to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds; and a witness false in one part of his testimony is to be distrusted in others. Evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and therefor if weaker and less satisfactory evidence is offered when it

appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. You have no right to disregard the testimony of a witness where his testimony has not been contradicted and where the witness giving it has not been impeached by any of the ways I pointed out to you a witness may be impeached. Wherever during the trial of [346] this case a fact is admitted to be true in open court by attorneys representing the plaintiff or defendant in this case, no evidence, or less evidence is required, as the admission proves its truth and you are bound to find the evidence in the case to be true upon such admission.

Now, ladies and gentlemen, if your verdict is to be for the plaintiff in this case, as to the way you determine detriment and the resultant damage she is entitled to, if you find she is entitled to any, and in that case you are instructed that the cost of reconstructing the building is not the market value of the building, but is only one of the elements to be considered in determining what is the market value of the building, and you must also take into consideration the amount of depreciation in the value of that building resulting from deterioration due to age and use. The measure of damages for injury to plaintiff's property is the difference between the market value of the property immediately before the injury and the market value of the property immediately after the injury. Evidence presented in court for the purpose of showing the cost of repairing or rebuilding the plaintiff's house and garage does not

of itself prove or establish the market value of said buildings either before or after they sustained damages, but as I charged you, it is one of the elements that may be taken into consideration. Now, by market value is meant the price that the premises in question would bring when offered for sale by one desiring but not compelled to sell, and bought by one desiring but not compelled to purchase. It is known in law [347] as a transaction between a willing seller and a willing buyer and where there is no compulsion exercised at all on the one hand to sell and the other hand to buy.

You are instructed that you have no right to trust your own opinion in this case, unsupported by proof. The testimony of the witnesses and the instructions of the court are your sole guide and you are bound by them. If you find for the plaintiff, then, in estimating the damage, the jury are to consider the market value of the premises before the happening of said injuries as compared with the present market value of said premises in so far as you find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's prayer in the amended complaint herein, and allow to the plaintiff such damages as will compensate her for such injuries to her property. In other words, ladies and gentlemen, if you find she is entitled to recover, then it is your function to place her as nearly whole as you can, to give her sufficient money to compensate her for whatever loss you find that she has suffered. That is your function, simply com-

pensation. You are not to give her more than you feel she has suffered. She is not to be rewarded, but it is just to determine as nearly as you can under the evidence and within the limits of the instructions exactly the monetary loss she has been caused, if you find she has been caused any and repay her for that monetary loss.

Evidence of damage to other property in the vicinity of plaintiff's property as described in the amended complaint herein, which was permitted to be introduced in this case, does not of itself prove damages to plaintiff's property but, if you find such damage to have occurred due to mining operations on the part of the defendant and that such damages to other property as a direct consequence, has affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property may be by you taken into consideration in fixing the fair market value of plaintiff's property, and the amount of damages if any, to the plaintiff. You are instructed that if you find your verdict for the plaintiff, you may assess such damages as will fairly compensate plaintiff for her loss by reason of the acts of the defendant as shown by the evidence in this case. However, in no event can you assess the damages in excess of \$7,000.00. And the reason for that is, ladies and gentlemen, that that is all she claims in her pleadings—she was damaged and you could not give her more even though you may feel her damages were more. You are instructed that if you find your verdict in favor of the plaintiff Nellie Poague, then

it is within your discretion to allow her interest at six per cent per annum from the date this suit was commenced upon such amount, if you do find for her the damage she suffered. The law does not require you to do that; it is entirely within your province whether you think she should receive interest or not. If you think she should, you may give it to her at the rate of six per cent per annum and if you think she should not, if you think the sum you have set [349] out in your verdict in dollars and cents compensate her, you can refuse to give interst on that sum.

Now, ladies and gentlemen, it requires a unanimous verdict to return a verdict in this case; twelve of you must agree on a verdict, all of you; your action must be unanimous. When you retire to your jury room, you are to select one of your number as foreman. That foreman will sign any verdict you agree on. As soon as you have all agreed on a verdict, you will notify the bailiff and you will then be brought into the courtroom to return your verdict whatever it may be. The case is not as yet submitted to you. There are some matters we must now undertake that would be better done outside of your presence and if you retire into the hall a moment and hold yourself in readiness to return at the call of the court.

(Jury leaves courtroom.)

The Court: Has the plaintiff any exceptions or objections to that portion of the charge given by the court to the jury that was not excepted to this morning?

Mr. Maury: We have no exception.

The Court: Has the defendant any exception or objection to that portion of the charge of the court just given to the jury that the defendant did not except or object to this morning?

Mr. Finlen: If the Court please, the defendant objects and excepts to that portion of the Court's charge which in effect informs the jury that the matter alleged in the complaint, evidence pled is not and can not be weighed as evidence, upon the ground and for the reason that the defendant asserts that admissions [350] contained in a complaint or pleading are judicial admissions and may be considered as elements.

The Court: There is no question but what that is correct, Mr. Finlen, but you did not correctly get my charge to the jury. I said matters in the complaint was not evidence, neither were they accepted as true, any facts set out in the complaint simply because it was a statement of fact and before there could be an admission there had to be two pleadings. In other words, in one pleading there is something stated as a fact. I told the jury because it was stated there does not make it a fact; but if in another pleading that is admitted, then it does become a fact and it is because of the admission set out in the second pleading.

Mr. Finlen: What I had in mind is the allegation in the complain that the property at the time of the filing of the complaint was of the value of \$500.00. The defendant states that the jury may consider the plaintiff bound by that allegation.

The Court: Well, your objection will be overruled. Is there anything further?

(Jury returns to courtroom.)

The Court: Now, ladies and gentlemen of the jury, the case is finally submitted to you. You will retire to your jury room to consider of your verdict in company with the bailiff. Forms of verdict will be submitted to you by the clerk and you will take them with you. When you have finally arrived at a unanimous verdict, you may inform the bailiffs and they will inform me and you will then be brought into the courtroom. You may [351] retire.

(The jury retires from the courtroom in charge of sworn bailiffs.)

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The following are the Instructions tendered by the Plaintiff and refused by the court:

[Title of Court and Cause.]

#### PLAINTIFF'S REQUEST FOR INSTRUCTIONS

Comes now the plaintiff in the above entitled action, Nellie Allen Poague, formerly Nellie Allen, and hereby respectfully requests the Court to give the jury the following instructions numbered 1 to 10, inclusive.

E. N. GENZBERGER,  
H. L. MAURY,  
A. G. SHONE,

Attorneys for Plaintiff.

## Instruction No. 1

You are instructed that in determining upon which side the weight or preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or knowing of their own personal knowledge the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent [352] consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances provided on the trial, and from all of these circumstances proved on the trial, and from all of these circumstances determine upon which side is the weight or preponderance of the evidence.

## Instruction No. 4

You are instructed that if you find from a preponderance of the evidence in this case that the plaintiff's property has been damaged through mining activities of the defendant in the so-called Emma Mine as alleged in the Amended Complaint herein, then you are instructed to find your verdict in favor of the plaintiff and against the defendant.

## Instruction No. 6

You are instructed that when the surface of land is owned by one, and the mineral beneath, with the

right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. In either case the obligation to protect the surface is the same.

*Catron v. South Butte Mining Co. (CCA 9th),  
181 Fed. 941.*

#### Instruction No. 7

I charge you that where there are wrongful acts of continued existence upon premises that are leased, the landlord and owner may be liable for damages resulting [353] therefrom, and the landlord is liable if he permits the tenant to do such acts and executes a lease without any demand or provision therein that the tenant refrain from doing such wrongful acts. Here it is proven that when Butte Copper and Zinc Company executed a lease to Anaconda Copper Mining Company to work the land for joint benefit of both, there was no reservation of any kind in the lease, or provision that Anaconda Company should protect the surface of plaintiff's ground, and in such condition, if the acts of the Anaconda Company, lessee, were unlawful and wrongful, then the Butte Copper and Zinc Company, lessor, is liable for the same.

#### Instruction No. 8

You are instructed that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault

a compensation therefor in money, which is called damages, and in this connection, you are further instructed that detriment is a loss of harm and suffered in property.

### Instruction No. 10-P

If you find the issues in this case in favor of the plaintiff and against the defendant, it then becomes your duty to assess plaintiff's damages in such sum as you may find from the evidence will reasonably compensate her for the detriment sustained by her, and as defined in these instructions in no case to exceed the sum of Seven Thousand and no/100 (\$7,000.00) Dollars, the amount prayed for in the Amended Complaint in this action. [354]

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The following are the Instructions tendered by the Defendant and refused by the court:

[Title of Court and Cause.]

### DEFENDANT'S REQUEST FOR INSTRUCTIONS

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 1 to 8, inclusive.

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR., and  
SAM STEPHENSON, JR.,  
Attorneys for Defendant.

**Instruction No. 1**

You are instructed that the Lessor of the property, in this case the Butte Copper and Zinc Company, Defendant, is not liable for the damages to the plaintiff's property due to the mining operations of a Lessee.

**Instruction No. 2**

You are instructed that you must disregard all evidence which was presented to you in this trial regarding gas explosions, and that you must not consider any such evidence in arriving at your verdict in this case.

**Instruction No. 3**

You are instructed that you must disregard all evidence which was presented to you in this trial regarding repairs to leaks in gas pipes or repairs or [355] changes made in the same, and that you must not consider any such evidence in arriving at your verdict in this case.

**Instruction No. 4**

Anyone who is in any way financially interested in the outcome of the controversy is an interested witness, and with reference to the testimony of interested witnesses the law says that such testimony is not to be disbelieved, but that it is to be weighed more closely and scrutinized more carefully by the jury than the testimony of disinterested witnesses.

## Instruction No. 5

You are instructed that the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or his or her motives or by contradictory evidence. The jury is the exclusive judge of his or her credibility. However, a witness false in one part of his or her testimony is to be distrusted in others.

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The following are the Instructions tendered by the Defendant and refused by the court:

[Title of Court and Cause.]

**DEFENDANT'S REQUEST FOR  
INSTRUCTIONS**

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 9 to 13, inclusive.

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR., and  
SAM STEPHENSON, JR.,  
Attorneys for Defendant.

## Instruction No. 12

You are instructed to return your verdict in favor of the defendant, Butte Copper and Zinc Company, a corporation.

## Instruction No. 13

You are instructed that there is no evidence in this case that the mining operations alleged to have damaged the plaintiff's property were carried on by Butte Copper and Zinc Company, either by itself or through a servant agent or partner.

The following are the Instruction tendered by the Defendant and refused by the court:

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## [Title of Court and Cause.]

**DEFENDANT'S REQUEST FOR  
INSTRUCTIONS**

The defendant in the above entitled action, Butte Copper and Zinc Company, a corporation, hereby respectfully requests the Court to give the jury the following instructions numbered 14 to 17, inclusive.

W. H. HOOVER,  
R. H. GLOVER,  
JOHN V. DWYER,  
J. T. FINLEN, JR., and  
SAM STEPHENSON, JR.,  
Attorneys for Defendant.

## Instruction No. 14

You are instructed that you must disregard all evidence which was presented to you in the trial of this case regarding plumbing bills alleged to have been paid by the plaintiff, and you must not consider such evidence in arriving at your verdict in this case.

## Instruction No. 15

You are instructed that you must disregard all evidence regarding the cost of razing the buildings on plaintiff's property and the filling of excavations thereon, and you must not consider any such evidence in arriving at your verdict in this case.

## Instruction No. 16

You are hereby instructed that the fact that the lease between the Butte Copper and Zinc Company, defendant in this case, and the Anaconda Copper Mining Company contains no specific provision to the effect that the Lessee must maintain the surface of the demised ground has no bearing on the issue in this case and must therefore be disregarded.

## Instruction No. 17

You are instructed that the admission contained in plaintiff's complaint that the property has a value of Five Hundred Dollars is binding upon the plaintiff, and you must therefore find that plaintiff's property has a value of not less than Five Hundred Dollars.

The following are the Instructions tendered by the Plaintiff and the Defendant and given by the Court:

### Instruction No. 2-P

In this case it has been admitted as a fact that the plaintiff, Ella Poague, is the owner of the property described in the Amended Complaint in this case and has been the owner of that property since December, 1910, and you are instructed that it is the law that said plaintiff had and has an absolute right to subjacent and lateral support for the surface of the same and for all of her structures thereon; good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even if to that end it be necessary to leave the ore unmined under, or adjacent to, or down the slope of the vein or veins in the land; it is not required that plaintiff prove that the mining methods were negligent or unskillful before she can recover; no matter how careful the method employed may have been, if the mining of the defendant underneath the surface of the Emma, Czarromah or Nellie Lode Claims, or any of them, did disturb the surface of Lot 4 and the North 10 feet of Lot 5 in Block 67, Butte Townsite, and injure the buildings thereon, then the defendant is liable for all the damage to [359] said property proximately caused thereby.

Evans Fuel Co. v. Leyda, 236 Pac. 1023.

## Instruction No. 3-P

You Are Instructed that the plaintiff, Ella Poague, is entitled under the facts in this case, not only to sub-surface but to lateral support. Sub-surface or subjacent support means support from below. Lateral support is support from the sides all around the building, and if you find from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings, has disturbed the plaintiff's surface, or has by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property has disturbed either the lateral support or the subjacent support of plaintiff's buildings, then the defendant is liable to the plaintiff for such disturbance because the law requires the defendant to so conduct its mining operations that the surface is at all times sustained.

## Instruction No. 6-D

You are instructed that the cost of reconstructing the building is not the market value of the building, but is only one of the elements to be considered in determining what is the market value of the building, and you must also take into consideration the amount of depreciation in the value of that building resulting from deterioration due to age and use. [360]

**Instruction No. 8-D**

You are instructed that the measure of damages for injury to plaintiff's property is the difference between the market value of the property immediately before the injury and the market value of the property immediately after the injury.

**Instruction No. 9-D**

You are instructed that the evidence presented in Court for the purpose of showing the cost of repairing or rebuilding the plaintiff's house and garage does not of itself prove or establish the market value of said buildings either before or after they sustained damages.

**Instruction No. 10-D**

You are instructed that by "market value" is meant the price that the premises in question would bring when offered for sale by one desiring but not compelled to sell, and bought by one desiring but not compelled to purchase.

**Instruction No. 11-D**

You are instructed that you have no right to trust your own opinion in this case, unsupported by proof. The testimony of the witnesses and the instructions of the Court are your sole guide and you are bound by them.

**Instruction No. 9-P**

The Court instructs the jury that, if you find

for the plaintiff, then, in estimating the damage, the jury are to consider the market value of the premises before [361] the happening of said injuries as compared with the present market value of said premises in so far as you find the market value has been reduced by injuries to the surface and to the improvements thereon, as set out in the plaintiff's prayer in the Amended Complaint herein, and allow to the plaintiff such damages as will compensate her for such injuries to her property.

4 Randall's Instructions to Juries, Sec. 3861  
p. 4201.

#### Instruction No. 5-P

The jury is instructed that the evidence of damage to other property in the vicinity of plaintiff's property as described in the amended complaint herein, which was permitted to be introduced in this case, does not of itself prove damages to plaintiff's property, but, if you find such damage to have occurred due to mining operations on the part of the defendant and that such damages to other property as a direct consequence, has affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property may be by you taken into consideration in fixing the fair market value of plaintiff's property, and the amount of damages, if any, to the plaintiff.

#### Instruction No. 7-D

You are instructed that if you find your verdict for the plaintiff you may assess such damages as

will fairly compensate plaintiff for her loss by reason of the acts of the defendant as shown by the evidence in [363] this case. However, in no event can you assess the damages in excess of Seven Thousand Dollars (\$7,000.00).

#### Instruction No. 11-P

The jury are instructed that if you find your verdict in favor of the plaintiff, Nellie Poague, then it is within your discretion to allow her interest at 6 per cent. per annum from the date this suit was commenced.

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That thereafter the jury retired to consider of their verdict and subsequently, to-wit: On April 7, 1947, returned into court their verdict in favor of the plaintiff and against the defendant, which said verdict is as follows, to-wit:

[Title of Court and Cause.]

#### VERDICT

We, the jury of the above entitled case, find the issues herein in favor of the plaintiff, Mrs. Nellie Allen Poague, formerly Nellie Allen, and against the defendant, Butte Copper & Zinc Co., a corporation, and assess plaintiff's damages in the sum of Fifty Five Hundred Dollars with interest. (\$5500.00) Dollars, with interest thereon at the rate of six per cent. per annum (6%) from February 2, 1946.

HARRY HIGH,

Foreman. [364]

## PLAINTIFF'S EXHIBIT No. 8-A

is as follows, to-wit:

This indenture, made and entered into as of 6th day of July, A. D. 1917, by and between the Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine (hereinafter called the "Zinc Company"), party of the first part, and the Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana (hereinafter called the "Mining Company"), party of the second part,

Witnesseth:

First: That, in consideration of the rentals and royalties to be paid as hereinafter provided, and of the mutual agreements hereinafter contained, the Zinc Company hereby leases and demises unto the said Mining Company the following described property, situated in the County of Silver Bow, State of Montana, particularly described as follows, to-wit:

The Emma quartz lode mining claim, Lot No. 131, Survey No. 728; together with lots 1, 2, 3, 4, 5, 6, 16, 17 and 18, in block 59, and all other lots owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim, Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned

Plaintiff's Exhibit No. 8-A—(Continued)  
by John P. Reins and J. Maude D. Ayers, of Butte,  
Montana, in and to the Ella Quartz lode mining  
claim, Lot No. 139, being all interest referred to,  
described [365] and covered by that certain lease  
and option, executed on September 8, 1916, by  
John P. Reins and J. Maud D. Ayers to F. J. Lyons,  
the said lease and option, having been assigned to  
the Zinc Company, and the said Zinc Company now  
proceeding to acquire title to the said interest in  
said Ella lode claim under and by virtue of said  
lease and option.

The Nellie quartz lode mining claim, Lot No. 136,  
and lots 1 to 10 inclusive, in block 5, of the Nellie  
Addition to the City of Butte.

Also all other real property and interest, situated  
in said County of Silver Bow, and which lies ad-  
jacent to or in the immediate vicinity of any of the  
property above leased, and which the Zinc Com-  
pany may acquire during the term of this lease,  
it being understood and agreed that if the Zinc  
Company shall, during the life of this lease, acquire  
any other real property or interests lying adjacent  
to or in the immediate vicinity of any of the above  
leased property, the said property so purchased  
shall, during the remainder of the leased term, be  
subject to and covered by the terms of this lease,  
and be leased and let hereby to the same effect as  
if fully described herein.

Also all veins, lodes, ledges and ore bodies and  
rights of every character and description, lying  
within or belonging to the above leased premises,  
or any part thereof.

## Plaintiff's Exhibit No. 8-A—(Continued)

There is excepted herefrom all surface lots and rights heretofore conveyed by the grantors of the Zinc Company, and which are not now owned or possessed [366] by the Zinc Company herein.

This lease shall be and continue in force and effect, unless sooner terminated by forfeiture or abandonment, for the period from the execution hereof, until and including the 8th day of July, 1931.

Second: It is agreed that the said Mining Company shall have the right, during the said leased term, to work all of the said premises above described and referred to, in mine fashion, and to extract and remove therefrom all ores and minerals which may be encountered, and which, in the Mining Company's opinion, may be desirable or profitable to extract and remove.

The said Mining Company agrees that it will, during the said leased term, continue in possession of said leased premises and the mine workings therein contained, and that it will install and provide such suitable equipment and machinery as may be necessary in order to operate the same.

The said Mining Company further agrees to prosecute with reasonable diligence the mining operations contemplated hereunder, and to that end binds itself to employ underground not less than ten men working each twenty shifts per month during the said leased term. All work done by the Mining Company on said property shall be done in a good, workmanlike, minerlike and substantial manner.

## Plaintiff's Exhibit No. 8-A—(Continued)

Third: The said Mining Company further agrees that on or before the 8th day of July, 1925, it will sink the shaft now on the said Emma lode claim an additional vertical distance so that the same shall, on or before [367] said date, reach a depth of eight hundred feet below what is known as the 800-foot level in said mine, or the said Mining Company shall extend southerly from such mine workings as shall be determined by it, a crosscut to be driven through the vertical plane of the north side line of said Emma claim, and to extend in a general southerly direction through said Emma claim, and beyond its south side line, to an intersection with that certain vein known and described as the Emma vein, said crosscut to be driven at a level which will cause it to crosscut the said Emma vein at the same approximate level that the crosscut southerly from said Emma shaft, at a depth of approximately eight hundred feet below the present so-called 800-foot level of said Emma shaft, would so crosscut the said Emma vein; and that the said Mining Company will drift on said Emma vein at least four hundred feet laterally from the said intersection. If, in the judgment of the Mining Company, the developments on the said level where the said crosscut shall intersect the said vein, justify the opening up of said level and the extraction of ores therefrom beyond the doing of development and prospect work, it is agreed that the Mining Company will sink the said Emma shaft, or such other shaft, as may be agreed upon between the parties hereto to

Plaintiff's Exhibit No. 8-A—(Continued)  
a sufficient depth to open up a level and connect the same with the crosscut or mine workings established by the said intersection at said level.

It is understood and agreed that any and all work, shaft sinking or crossecutting heretofore done by the Mining Company shall be considered, so far as the same [368] is applicable, part of the work herein provided for.

Fourth: The said Mining Company shall be entitled to retain and keep, for its own use and benefit, fifty per cent of the net returns from all ores and minerals mined hereunder, and shall account for and pay to the Zinc Company the remaining fifty per cent of the said returns, the said Mining Company to account to the Zinc Company for the said fifty per cent to be paid to the Zinc Company, within fifteen days after receiving settlement from the smelter or reduction works for the ores and minerals shipped.

In arriving at the net returns for the purpose of division, as herein provided, between the Zinc Company and the Mining Company, respectively, all costs and charges of maintaining, preserving, protecting the said property, including all taxes upon the property leased, all costs and charges of mining, milling, smelting, reduction, development, transportation and other charges, of every kind whatsoever, incurred in connection with the maintenance, operation and mining of the said premises, and the transportation and reduction of the ores obtained therefrom, and the selling of the metals returned or

Plaintiff's Exhibit No. 8-A—(Continued)  
disposed of, shall be deducted, to reach the net returns to be divided between the parties as herein set forth; provided that any crosscut which may be driven from other properties of the Mining Company to develop said premises shall not be considered development work for the purpose of deducting the cost thereof, until such crosscut or crosscuts shall have passed through the vertical plane of the north side line of [369] the Emma or Czarromah lode claims.

Fifth: It is understood and agreed that the management of the property hereby leased, and the conduct of all mining operations thereon, shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; also, that the Mining Company shall have the exclusive right to arrange for, enter into and make such contract as it may see fit, for the milling and reduction of any and all ores extracted from the said premises, and the marketing and disposing of the metals obtained therefrom; provided the said Mining Company will use due diligence to make as favorable contracts in this connection as it may be able to obtain in the general course of the trade.

Sixth: At any time when the Mining Company possesses milling, smelting or other reduction works, capable of and suitable for treating the character of ores which may be obtained from the leased premises, and undertaking to treat and reduce such ores so obtained, it is agreed that the said Mining Company will make a contract with

Plaintiff's Exhibit No. 8-A—(Continued)

the Zinc Company for the treatment of such ores upon as favorable terms as are made by the said Mining Company for the treatment of similar ores of like grade and quantity, treated for any other custom producer. A contract for smelting and reduction of such ores for five years of the period covered by this lease has been executed contemporaneously with the execution hereof.

Seventh: All money necessary for the operations herein provided for, including taxes, shall be advanced by the Mining Company, but the Zinc Company shall have [370] no authority to incur any expense, nor will the said Mining Company, nor the said operations be liable therefor, unless the same has first been agreed to by the said Mining Company, and no salaries or other expenses of the Zinc Company shall be charged in any way against the said Mining Company or the said operations to be conducted under this lease.

Eighth: It is further understood and agreed that the said Mining Company may at any time abandon and terminate this lease and cease working and operating the property covered hereby, by giving six months' notice in writing to the said Zinc Company of its intention so to do, and during the said period of six months after giving of such notice, the said Mining Company shall keep the mine workings in said property free from water, and upon the termination of said six months period, and upon the turning over of the possession of said property by the said Mining Company to the said Zinc Company, all obligations and liability on the

Plaintiff's Exhibit No. 8-A—(Continued)  
part of the Mining Company, of any kind or character hereunder, will cease and terminate, and this lease shall be at an end.

It is further understood and agreed that in the event that the said Mining Company be by an act of God, fire, flood, water, strike, lockouts or other causes beyond its control, prevented from fulfilling any condition or term of this lease, such failure shall not be considered a breach of the terms hereof, but the said Mining Company agrees, in any such case, to use all reasonable diligence to remove such preventing [371] cause.

Ninth: It is further understood and agreed that upon the expiration of this lease, either by lapse of time, abandonment or forfeiture, the said Mining Company will return the peaceful possession of said leased premises to the said Zinc Company, with all openings and workings thereon, necessary for the continued operation of said property, in good condition for such further operation, and that all machinery and equipment which shall have been permanently installed or attached to the mine property or workings shall become the property of the Zinc Company. In determining the property and equipment which shall pass to the Mining Company, it is understood that the same shall not include tools, supplies and equipment which shall not have been affixed to the realty.

Tenth: It is further understood and agreed that the Mining Company shall keep proper books and records showing the mining operations conducted under this lease and the proceeds therefrom, and

## Plaintiff's Exhibit No. 8-A—(Continued)

that the Zinc Company shall have the right, through its duly designated officers, representatives or agents, to examine all accounts of the Mining Company, kept in connection with the performance of work hereunder, and the making of settlements therefor, and that the said Zinc Company, its officers, representatives or agents, shall at all reasonable times have access to and egress from all of the premises of the Zinc Company, in the control of the Mining Company hereunder, together with the right to make full inspection and survey of the same and to [372] obtain at reasonable periods from the Mining Company copies of working maps, showing the mining operations conducted in the said property.

The said Mining Company, except as hereinafter expressly excepted, hereby assumes all claims which may arise in favor of any individual, firm or corporation for any tort or contract obligation arising out of the operation of the leased premises during such period as they shall be in possession of the Mining Company, or incurred while controlling the same, and the Mining Company will indemnify and keep indemnified the said Zinc Company, its successors and assigns, against any and all such claims, and at its own cost and expense defend such claims and pay any cost or judgment recovered thereon; provided, however, that the said Mining Company shall not be under any obligation or duty, or incur any liability whatsoever in connection with any claim which may be asserted by any person or corporation, of ownership to any of the premises

Plaintiff's Exhibit No. 8-A—(Continued)  
hereby leased, or any ores or minerals mined or removed therefrom, or for trespass upon any of the premises hereby leased; this lease being entered into upon the understanding and basis that the Zinc Company is the owner of the premises and ore bodies hereinabove described and referred to, and shall be deemed, from the date hereof to supersede the lease of July 8, 1915.

This lease shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns. [373]

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers, thereunto duly authorized, the day and year above written.

[Seal]           **BUTTE COPPER & ZINC  
COMPANY,**  
By /s/ **ALBERT J. SILIGMAN,**  
Its President.

Attest:

/s/ **A. L. BAILEY,**  
Its Secretary.

[Seal]           **ANACONDA COPPER  
MINING COMPANY,**  
By /s/ **B. B. THAYER,**  
Its Vice-President.

Attest:

/s/ **A. H. MELIN,**  
Its Secretary.

## Plaintiff's Exhibit No. 8-A—(Continued)

State of New York,  
County of New York—ss.

On this 21st day of August, A. D. 1917, before me, M. E. Bryans, a notary public in and for the County and State of New York, personally appeared Albert J. Seligman, to me known and known to me to be the President of the Butte Copper & Zinc Company, the corporation that executed the within agreement, and acknowledged to me that such corporation executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written. [374]

[Seal]                  M. E. BRYANS,  
Notary Public in and for New York County and  
State. (No. 273.)

My commission expires March 30, 1919.

State of New York,  
County of New York—ss.

On this 21st day of August, A. D. 1917, before me, M. E. Bryans, a notary public in and for the County and State of New York, personally appeared B. B. Thayer, to me known and known to me to be the Vice-President of the Anaconda Copper Mining Company, the corporation that executed the within agreement, and acknowledged to me that such corporation executed the same.

In Testimony Whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[Seal]            M. E. BRYANS,

Notary Public in and for New York County and State. (No. 273.)

My commission expires March 30, 1919.

Filed April 7, 1947. H. H. Walker, Clerk. [375]

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PLAINTIFF'S EXHIBIT No. 9

is as follows, to-wit:

This indenture, made and entered into as of this 17th day of October, A. D. 1927, by and between the Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine (hereinafter called the "Zinc Company"), party of the first part, and the Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana (hereinafter called the "Mining Company"), party of the second part,

Witnesseth:

Whereas, under date of July 6, 1917, the Zinc Company as lessor, duly entered into a lease with the Mining Company, as lessee, whereby the Zinc Company leased and demised to the Mining Com-

Plaintiff's Exhibit No. 9—(Continued)  
pany the following described property situated in  
the County of Silver Bow, State of Montana, to wit:

The Emma quartz lode mining claim, Lot No.  
131, Survey No. 728; together with lots 1, 2, 3, 4  
5, 6, 16, 17 and 18, in block 59, and all other lots  
owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey  
No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim,  
Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned  
by John P. Reins and J. Maude D. Ayers, of Butte,  
Montana, in and to the Ella Quartzlode mining  
claim, Lot No. 139, being all interest referred to,  
described and covered by that certain lease and  
option executed on [376] September 8, 1916, by  
John P. Reins and J. Maude D. Ayers to F. J.  
Lyons, the said lease and option having been as-  
signed to the Zinc Company, and the said Zinc Com-  
pany having acquired title to the said interest in  
said Ella Lode claim under and by virtue of said  
lease and option.

The Nellie quartz lode mining claim, Lot No. 136,  
and lots 1 to 10 inclusive, in block 5, of the Nellie  
Addition to the City of Butte.

Also all other real property and interest, situated  
in said County of Silver Bow, and which lies ad-  
jacent to or in the immediate vicinity of any of the  
property above described, and which the Zinc Com-

Plaintiff's Exhibit No. 9—(Continued)  
pany has acquired or may acquire during the term  
of said lease.

Also all veins, lodes, ledges and ore bodies and  
rights of every character and description, lying  
within or belonging to the above leased premises,  
or any part thereof; and

Whereas, during the term of said lease, the Zinc  
Company has acquired the Mary Louise quartz lode  
mining claim, Lot No. 159, Survey No. 807, the  
Railroad quartz lode mining claim, Lot No. 330,  
Survey No. 1201, and the Ophir quartz lode mining  
claim, Lot No. 220, Survey No. 968, in said County  
of Silver Bow, State of Montana, which claims are  
now subject to the terms of said lease.

Whereas, the parties hereto desire to extend the  
term of said lease from the 8th day of July, 1931,  
to and including the 8th day of July, 1936, upon  
the same rentals and royalties and subject to the  
same conditions as provided in said lease: [377]

Now, Therefore, in consideration of the premises  
and of the rentals and royalties to be paid as pro-  
vided in said lease and of the mutual agreements  
therein contained and of the sum of One Dollar  
paid by the Mining Company to the Zinc Company,  
receipt of which is hereby acknowledged, and of  
other valuable considerations, the Zinc Company  
hereby modifies the said lease so that the term  
thereof shall continue until and including the 8th  
day of July, 1936, unless sooner terminated by for-

Plaintiff's Exhibit No. 9—(Continued)

feiture or abandonment, such modification to have the same effect as though the said lease as originally executed had so provided.

It is understood and agreed that if the Zinc Company shall during the life of said lease as herein modified, acquire any other real property or interests lying adjacent to or in the immediate vicinity of any of the property leased pursuant to the terms of said lease, as herein modified, the said property so purchased and all veins, lodes, ledges and ore bodies and rights of every character and description lying within or belonging to the said property or any part thereof shall, during the remainder of the leased term, as herein modified, be subject to and covered by the terms of said lease, as herein modified, and be leased and let to the same effect as if fully described in said lease.

Except as herein specifically modified, the said lease and all of the terms, provisions and conditions thereof shall continue in full force and effect and shall be applicable to the expiration of the extended term. Nothing in this agreement shall modify the provisions [378] of the agreement between the parties hereto, dated July 6, 1917, as modified by the parties hereto, respecting the method of accounting for ores mined from the leased properties.

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers,

Plaintiff's Exhibit No. 9—(Continued)  
thereunto duly authorized, the day and year above  
written.

BUTTE COPPER & ZINC  
COMPANY,  
By /s/ ALBERT J. SELIGMAN,  
Its President.

[Seal]      /s/ A. L. BAILEY,  
                  Its Secretary.

ANACONDA COPPER  
MINING COMPANY,  
/s/ B. B. THAYER  
                  Its Vice-President.

Attest:

[Seal]      /s/ A. H. MELIN,  
                  Its Secretary.

Filed April 7, 1947. H. H. Walker, Clerk. [379]

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PLAINTIFF'S EXHIBIT No. 10

is as follows, to-wit:

This Indenture made and entered into as of the 1st day of June, A. D., 1933, by and between Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine, (hereinafter called the "Zinc Company"), party of the first part, and Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana (hereinafter called the "Mining Company"), party of the second part,

## Plaintiff's Exhibit No. 10—(Continued)

## WITNESSETH:

Whereas, under date of July 6, 1917, the Zinc Company as lessor duly entered into a lease with the Mining Company as lessee, whereby the Zinc Company leased and demised to the Mining Company the following described property, situated in the County of Silver Bow, State of Montana, to-wit:

The Emma quartz lode mining claim, Lot No. 131, Survey No. 728; together with lots 1, 2, 3, 4, 5, 6, 16, 17 and 18, in block 59, and all other lots owned by the Zinc Company in the Butte Townsite.

The Czarromah quartz lode mining claim, Survey No. 720, Lot No. 129.

The Travonia Fraction quartz lode mining claim, Survey No. 791, Lot No. 149.

All the right, title and interest formerly owned by John P. Reins and J. Maude D. Ayers, of Butte, Montana, in and to the Ella quartz lode mining claim, Lot No. 139, being all interest referred to, described and covered by that certain lease and option executed [380] on September 8, 1916, by John P. Reins and J. Maude D. Ayers to F. J. Lyons, the said lease and option having been assigned to the Zinc Company, and the said Zinc Company having acquired title to the said interest in said Ella lode claim under and by virtue of said lease and option.

The Nellie quartz lode mining claim, Lot No. 136, and Lots 1 to 10, inclusive, in block 5, of the Nellie Addition to the City of Butte.

## Plaintiff's Exhibit No. 10—(Continued)

Also all other real property and interest, situated in said County of Silver Bow, and which lies adjacent to or in the immediate vicinity of any of the property above described, and which the Zinc Company has acquired or may acquire during the term of said lease.

Also the veins, lodes, ledges and ore bodies and rights of every character and description, lying within or belonging to the above leased premises, or any part thereof; and

There were excepted from the property leased all surface lots and rights conveyed by the grantors of the Zinc Company prior to the date of the lease and which at that date were not owned or possessed by the Zinc Company.

Whereas, during the term of said lease the Zinc Company has acquired the Mary Louise quartz lode mining claim, Lot No. 159, Survey No. 807, the Railroad quartz lode mining claim, Lot No. 330, Survey No. 1201, and the Ophir quartz lode mining claim, Lot No. 220, Survey No. 968, in said County of Silver Bow, State of Montana, which claims are now subject to the terms of said lease; [381] and

Whereas, the parties hereto by indenture dated as of the 17th day of October, A.D., 1927, extended the term of said lease from the 8th day of July, 1931, to and including the 8th day of July, 1936, and by agreement dated the 7th day of June, 1932, agreed to a temporary suspension of operation of said properties; and

## Plaintiff's Exhibit No. 10—(Continued)

Whereas, the parties hereto hereby desire to modify the provisions of said lease as extended and to further extend the term thereof;

Now, Therefore, in consideration of the premises, and of the mutual covenants herein contained, and of the rentals and royalties to be paid as provided in said lease as heretofore and herein modified, and of the sum of One Dollar (\$1) paid by the Mining Company to the Zinc Company, receipt of which is hereby acknowledged, and of other valuable considerations, the parties hereto do hereby agree as follows:

1. The said agreement between the parties hereto dated the 7th day of June, 1932, shall be terminated as of the 1st day of June, 1933, provided that the Mining Company shall be entitled to deduct, as hereinafter provided in paragraph 4, all amounts expended pursuant to said agreement, as well as any and all amounts expended or to be expended under said lease and this agreement, in arriving at the net returns of any future operations and making the division provided in Article Fourth of said lease.

2. The Mining Company agrees to expend over the three months' period beginning June 1, 1933, and ending August 31, 1933, approximately the sum of Forty-five [382] Thousand Dollars (\$45,000) in the aggregate for (a) repairs to levels, stopes and working places in the mines covered by said lease, (b) reconditioning the mining machinery and equipment, and (c) for all other purposes required by

Plaintiff's Exhibit No. 10—(Continued)  
said lease, including all expenditures made during the month of June, 1933, by the Mining Company under the above-mentioned agreement dated the 7th day of June, 1932. The Mining Company shall deliver to the Zinc Company on July 15, 1933, August 15, 1933, and September 15, 1933, a certified statement showing its expenditures under this paragraph 2.

3. The parties hereto hereby modify and amend the said lease so that the term thereof shall continue until and including the 8th day of July, 1941, unless sooner terminated in accordance with the specific provisions for termination contained in said lease, such modification to have the same effect as though the said lease as originally executed had provided for a term expiring on the 8th day of July, 1941.

4. Before making any division of the net returns of any future operation under said lease or paying any part thereof to the Zinc Company, as provided in Article Fourth of said lease, the Mining Company shall be entitled to and shall deduct from such net returns

(a) All amounts heretofore expended by the Mining Company under the terms of said agreement dated the 7th day of June, 1932;

(b) All expenditures heretofore made under said lease and which have not been heretofore deducted from said returns and which by the terms of said lease the Mining Company is entitled to deduct before making any division of said returns;

## Plaintiff's Exhibit No. 10—(Continued)

(c) All expenditures hereafter made by the Mining Company under said lease and which by the terms thereof the Mining Company is entitled to deduct before making any division of said returns; and

(d) All expenditures made or to be made under the terms of paragraph 2 hereof; it being understood that the Mining Company shall be entitled to make such deductions regardless of the period of time required to provide net returns sufficient to equal such deductions, and that until the net returns of future operations have been sufficient to provide not only for the items referred to in said Article Fourth, but for the foregoing items as well, the Zinc Company shall not be entitled to any part of the net returns of such operations.

5. It is understood and agreed that if the Zinc Company shall during the life of said lease as herein modified acquire any other real property or interests lying adjacent to or in the immediate vicinity of any of the property leased pursuant to the terms of said lease, as herein modified, the said property so purchased and all veins, lodes, ledges and ore bodies and rights of every character and description lying within or belonging to the said property or any part thereof shall, during the remainder of the leased term, as herein modified, be subject to and covered by the terms of [384] said lease, as herein modified, and be leased and let to the same effect as if fully described in said lease.

## Plaintiff's Exhibit No. 10—(Continued)

6. Except as herein specifically modified, the said lease and all of the terms, provisions and conditions thereof shall continue in full force and effect and shall be applicable to the expiration of the extended term. Nothing in this agreement shall modify the provisions of the agreement between the parties hereto dated July 6, 1917, as modified by the parties hereto, respecting the method of accounting for ores mined from the leased properties, such agreement to continue until terminated by either party in accordance with its terms.

In Witness Whereof, the parties hereto have caused these presents to be executed, and their corporate seals affixed, by their respective officers thereunto duly authorized the day and year above written.

BUTTE COPPER & ZINC  
COMPANY,  
By A. J. SELIGMAN,  
President.

Attest:

C. C. NICHOLS,  
Asst. Secretary.

[Seal] ANACONDA COPPER MINING  
COMPANY,  
By J. R. HOBBINS,  
Vice President.

Attest:

D. B. HENNESSY,  
Secretary.

[Corporate Seal]

**Plaintiff's Exhibit No. 10—(Continued)**

State of New York,  
County of New York—ss.

On this 15th day of August, 1933, before me personally came Albert J. Seligman, to me known, who, being by me duly sworn, did depose and say that he resides in New York, N. Y.; that he is the President of Butte Copper & Zinc Company, one of the corporations described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[Seal] W. G. MARTIN,  
Notary Public, Nassau County

Certificate filed in N. Y. County County Clerk's  
No. 2, Reg. No. 4M1.

My commission expires March 30, 1934.

State of New York,  
County of New York—ss.

On this 15th day of August, 1933, before me personally came J. R. Hobbins, to me known, who, being by me duly sworn, did depose and say that he resides in Butte, Montana; that he is the Vice President of Anaconda Copper Mining Company, one of the corporations described in and which executed the foregoing instrument; that he knows

Plaintiff's Exhibit No. 10—(Continued)  
the corporate seal of said corporation; that the seal  
affixed to said instrument is such corporate [386]  
seal; that it was so affixed by order of the Board of  
Directors of said corporation, and that he signed  
his name thereto by like order.

[Seal]

M. E. BRYANS,

Notary Public, Queens County  
No. 222.

Certificate filed in N. Y. County County Clerk's  
No. 136, Reg. No. 4B64.

My commission expires March 30, 1934.

Filed April 7, 1947. H. H. Walker, Clerk. [387]

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PLAINTIFF'S EXHIBIT No. 11

is as follows, to-wit:

This Indenture, made this 24th day of June, 1940, by and between Butte Copper & Zinc Company, a corporation organized under the laws of the State of Maine, (hereinafter called the "Zinc Company"), party of the first part, and Anaconda Copper Mining Company, a corporation organized under the laws of the State of Montana, (herein-after called the "Mining Company"), party of the second part, Witnesseth:

That, Whereas, under date of July 6, 1917, the Zinc Company, as lessor, entered into a lease with the Mining Company, as lessee, whereby the Zinc

Plaintiff's Exhibit No. 11—(Continued)

Company leased and demised to the Mining Company the properties therein described, which are hereinafter described, for a term expiring the 8th day of July, 1931; and

Whereas, thereafter by agreement dated the 17th day of October, 1927, the term of said lease was extended to and including the 8th day of July, 1936, under the same general terms and conditions as provided in said original lease; and

Whereas, thereafter by agreement dated June 1, 1933, the parties hereto modified said lease in certain particulars, and extended the term thereof to the 8th day of July, 1941, and said lease as modified by the subsequent agreements is now in full force and effect; and

Whereas, the parties hereto desire to modify the provisions of said lease and to extend the term thereof, and to incorporate in a new lease document the various changes and modifications which have been made in said lease, and to make other changes and modifications related [388] to the present condition of the property and the continued operation thereof, and to execute a new agreement superseding all previous agreements relating to the subject matter, and to cancel said lease of July 6, 1917, for the remaining term thereof to the end that this agreement be effective contemporaneously with the cancellation thereof;

Now, Therefore, in consideration of the rents to be paid, and covenants performed, and the mutual agreements as herein provided, the Zinc Company

Plaintiff's Exhibit No. 11—(Continued)  
does hereby lease, let and demise unto the Mining  
Company the following described property, situated  
in the County of Silver Bow, State of Montana,  
particularly described as follows:

The Emma Quartz Lode Mining Claim (Patented), Lot No. 131, Survey No. 728;

The Czarromah Quartz Lode Mining Claim (Patented), No. 129, Survey No. 720;

The Travonia Fraction Quartz Lode Mining Claim (Patented), Lot No. 149, Survey No. 791;

The Nellie Quartz Lode Mining Claim (Patented),  
Lot No. 136, Survey No. 759;

The Mary Louise Quartz Lode Mining Claim (Patented), Lot No. 159, Survey No. 807;

The Railroad Quartz Lode Mining Claim (Patented), Lot No. 330, Survey No. 1201;

The Ophir Quartz Lode Mining Claim (Patented),  
Lot No. 220, Survey No. 968;

The Manhattan Quartz Lode Mining Claim (Patented), Survey No. 2647;

The Single Tax Quartz Lode Mining Claim (Patented), Lot No. 587, Survey No. 2681; [389]

Forty-two sixty-fourths (42/64ths) interest, and  
all other right, title and interest of the Zinc Com-  
pany in and to the Ella Quartz Lode Mining Claim  
(Patented), Lot No. 139, Survey No. 770;

All that portion of the Arizona Street Placer  
Claim (Patented), Mineral Application No. 787,  
Mineral Entry No. 1347; described as follows:

Beginning at the S. W. corner of the tract herein  
described which is also the S. E. Cor. No. 5 of Sur.

## Plaintiff's Exhibit No. 11—(Continued)

No. 664, Black Placer, and running thence North 693 feet to the N. E. corner No. 4 of Sur. No. 664, Black Placer; thence East 3 feet more or less along the boundary of the Butte Townsite to the east side of Wyoming street; thence S.  $5^{\circ} 30'$  E., along the east side of Wyoming street, projected southerly from the Butte Townsite, 133 feet, more or less, to the S. W. Cor. of the Barnard Lot; thence N.  $82^{\circ}$  E., 168 feet along the South Boundary of the Barnard Lot to the West side of Arizona street, projected southerly from the Butte Townsite; thence North along the west side of Arizona street, projected southerly from the Butte Townsite, 110 feet to the boundary of Butte Townsite; thence east along the boundary of the Butte Townsite 60 feet to the west boundary of Survey No. 783; Hesperus Lode; thence south 323 feet along the west boundary of Survey No. 783, Hesperus Lode, to the west boundary of Arizona street; thence N.  $22^{\circ} 15'$  W., along the west side of Arizona street, projected northerly from the Hopkins Addition to the north-east corner of the Mary McBride Lot; thence S.  $67^{\circ} 45'$  W., 100 feet to the N.W. cor. of the Mary McBride Lot; thence S.  $22^{\circ} 15'$  E., 93.5 feet along the east side of alley to the north boundary of Sur. No. 807, Mary Louis Lode; thence N.  $75^{\circ} 50'$  W., along the north boundary of Sur. No. 807, Mary Louise Lode, 18 feet, more or less, to the west side of alley; then N.  $22^{\circ} 05'$  W., 109.5 feet along the west side of alley; thence N.  $0^{\circ} 05'$  W., 46.5 feet along west side of alley; thence west 58.5 feet along

Plaintiff's Exhibit No. 11—(Continued)  
north boundary of Provo Lot to the east side of Wyoming street, projected southerly from Butte Townsite; thence S. 4° 03' E., 45 feet to the southwest corner of Provo Lot; thence East 54.5 feet to the S.E. cor. of the Provo Lot; thence S. 86° 0' W., 54.5 feet to the N.W. Cor. of Thomas R. Hinds Lot; thence S. 4° 03' E., 75.3 feet more or less to the north boundary of Sur. No. 807, Mary Louise Lode, projected westerly; thence S. 75° 50' E., 5 feet, more or less, to the N.W. Cor. No. 2 of Sur. No. 807, Mary Louise Lode; thence S. 3° 45' E., along the west boundary of Sur. No. 807, Mary Louise Lode, 376.5 feet to the south boundary of Sur. No. 664, Black Placer projected easterly; thence west along the south boundary of Sur. No. 664, Black Placer, projected easterly, 61.5 feet to the place of beginning.

Excepting from the foregoing the following described tract: Beginning at the S.E. Cor. of the tract herein described, from which the S.E. Cor. of Butte Townsite on the west boundary of Sur. No. 783, Hesperus Lode, bears N. 14° 57' E., 210 feet and running thence S. 67° 48' W., 100 feet; thence N. 0° 15' W., 47 feet; thence N. 67° 45' E., 100 feet; thence S. 0° 15' E., 47 feet to the place of beginning.

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347, described as follows:

Beginning at the N.W. Cor. of the tract herein described, a point on the S. boundary of Sur. No. 664, Black Placer, from which the S.W. Cor. No. 6

Plaintiff's Exhibit No. 11—(Continued)  
of said Sur. No. 664, Black Placer, bears west 50 feet, and running thence along the S. boundary of said Sur. No. 664, Black Placer, 100 feet; thence south 35 feet; thence N.  $83^{\circ} 0'$  W., 100 feet; thence north 24 feet to the place of beginning.

All that portion of the Arizona Street Placer Claim (Patented), Mineral Application No. 787, Mineral Entry No. 1347, described as follows:

Beginning at the N.W. Cor. of the tract herein described, which is also the S.W. Cor. No. 6 of Sur. No. 664, Black Placer, and running thence east along the south boundary of said Sur. No. 664, Black Placer, 50 feet; thence south 24 feet; thence S.  $83^{\circ} 0'$  E., 100 feet; thence north 35 feet to a point in south boundary of Sur. No. 664, Black Placer; thence east 211.5 feet, more or less, to a point on the west boundary of Sur. No. 807, Mary Louise Lode; thence S.  $3^{\circ} 45'$  E., along the west boundary of Sur. No. 807, Mary Louise Lode, 113 feet, more or less, to a point on the north boundary of Sur. No. 1201, Railroad Lode; thence N.  $89^{\circ} 40'$  W., along the north boundary of Sur. No. 1201, Railroad Lode, 73.5 feet, more or less, to the N.W. Cor. No. 4 of said Sur. No. 1201, Railroad Lode; thence S.  $1^{\circ} 0'$  W., along the west boundary of said Sur. No. 1201, Railroad Lode, 90.5 feet, more or less to a point on the north boundary of Sur. No. 759, Nellie Lode, thence N.  $83^{\circ} 0'$  W., along the north boundary of said Sur. No. 759, Nellie Lode, 297.5 feet, more or less, to a point on the east boundary of the Butte Townsite; thence North along the east boundary of

Plaintiff's Exhibit No. 11—(Continued)  
the Butte Townsite, 165.5 feet, more or less, to the  
place of beginning.

All that portion of the Arizona Street Placer  
Claim (Patented), Mineral Application No. 787,  
Mineral Entry No. 1347, described as follows:

Beginning at the S.E. Cor. of Lot 1 in Block 56  
of Butte Townsite, and running thence south along  
the west side of Arizona street 114.4 feet; thence  
S. 82° 0' W., 168 feet to the east line of Wyoming  
street; thence north along the east line of Wyoming  
street, 123.6 feet to the S.W. Cor. of Lot 2 in Block  
56 of Butte Townsite; thence east along the south  
side line of Lots 2 and 1 in said Block 56, 172 feet  
to the place of beginning.

The Black Placer Quartz Lode Mining Claim  
(Patented), Lot No. 110, Survey No. 664, in Section  
13, Township 3 North, Range 8 West;

The Bob Ingersoll Quartz Lode Mining Claim  
(Unpatented), as described in notice of location  
thereof recorded in the office of the County Clerk  
and Recorder of Deer Lodge County, in Book "L"  
of Lodes, at page 607, and in the office of the County  
Clerk and Recorder of Silver Bow County, Montana,  
in Book "B" of Lodes at page 732 of Transcribed  
records;

The Montana Central Quartz Lode Mining Claim  
(Unpatented), as described in the Notice of Location  
thereof recorded in Book "K" of Lodes, at  
page 729 of the records of the office of the County  
Clerk and Recorder of Deer Lodge County, Montana,  
and in Book 6 of Lodes at page 252 in the

## Plaintiff's Exhibit No. 11—(Continued)

Transcribed records of the office of the County Clerk and Recorder of Silver Bow County, Montana;

All that portion of the surface of the Mary Louise Lode Mining Claim (Patented), Survey No. 807, Lot 159, in the Southeast Quarter (SE $\frac{1}{4}$ ) of Section Thirteen (13), Township Three (3) North, Range Eight (8) West, and Lot 81, in the Southwest Quarter (SW $\frac{1}{4}$ ), Section Eighteen (18), Township Three (3) North, Range Seven (7) West, Silver Bow County, Montana, described as follows:

Beginning at the Northeast Corner of the tract herein described, from which the Northwest Corner of Lot 1, Block 3, of the Hopkins Addition to the City of Butte, Montana, bears N. 68° 02' E., 16 ft. and running thence S. 68° 02' W. 70.85 ft.; thence S. 84° 19' W. 0.96 ft.; thence S. 5° 41' E. 94.03 ft.; thence N. 68° 02' E. 98.71 ft.; thence N. 22° 15' W. 90.0 ft. to the place of beginning, containing an area of 0.18 acres, more or less, subject to an easement for Park purposes to School District No. 1, to the portion of this above-described tract west of a line parallel to the east boundary and 60 ft. west from said line.

All that portion of the surface of the Ophir Quartz Lode Mining Claim (Patented), Lot No. 220, Survey No. 968, described as follows:

Beginning at a point on the south line of said Ophir Lode Mining Claim, from which point corner No. 4, the Southwest Corner of said Ophir Lode Claim, bears N. 71° 30' W., 358.8 feet and running

Plaintiff's Exhibit No. 11—(Continued)  
thence north 195.8 feet; thence east 512 feet; thence  
south 300 feet; thence west 199.3 feet; thence N.  
71° 30' W., 329.9 feet; to the place of beginning.  
Containing 3.18 acres, more or less.

Excepting, however, that portion which lies south  
of the Butte, Anaconda & Pacific Railroad track,  
which railroad track crosses said Ophir Lode Claim  
in an easterly and westerly direction.

Lot 14, and an undivided one-half interest in  
Lots 15 and 16, in Block 57, and Lots 1, 2, 3, 4, 5,  
6, 14, 15, 16, 17 and 18 in Block 59 of the Original  
Townsit of Butte, according to the official plat and  
survey thereof on file and of record in the office of  
the County Clerk and Recorder of Silver Bow  
County; Montana; [395]

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, in Block 5 of  
the Nellie Addition to the Townsite of Butte, ac-  
cording to the official plat and survey thereof on  
file and of record in the office of the County Clerk  
and Recorder of Silver Bow County, Montana;

All minerals, and the right to remove the same,  
in and under Lots 1 and 2 in Block 56 of the  
Original Townsite of Butte, according to the official  
plat and survey thereof on file and of record in the  
office of the County Clerk and Recorder of Silver  
Bow County, Montana.

Also, all other real property, property rights, and  
interests in property situated in the County of  
Silver Bow, State of Montana, lying adjacent to  
or in the immediate vicinity of any of the property  
above-described, and which the Zinc Company owns

## Plaintiff's Exhibit No. 11—(Continued)

or has acquired, or may acquire during the term of this lease; also all veins, lodes, ledges and ore bodies and rights of every character and description lying within or belonging to the above leased premises or any part or parcel thereof.

Excepting, however, from the property leased hereby, all surface lots and rights heretofore conveyed by grantors of the Zinc Company prior to the date hereof and at that date not owned or possessed by Zinc Company.

It Is Understood And Agreed, that if the Zinc Company shall, during the life of this lease, acquire any other real property or interests in property lying adjacent to or in the immediate vicinity of any of the above-described property, that the property or property rights [396] so acquired shall, during the remainder of this lease term, be subject to and covered by the terms of this lease, and be leased and let hereby to the same effect as if fully described herein.

First: This lease shall become effective upon the date hereof, and shall continue in force and effect unless sooner terminated by forfeiture or abandonment for the period of ten (10) years from said date, until and including the 24th day of June, 1950. Upon the date of this instrument and simultaneously with the effective date hereof, the said lease dated the 6th day of July, 1917, and all amendments and modifications thereof shall be and are hereby cancelled and annulled. It is understood that such cancellation shall not affect any rights or obliga-

Plaintiff's Exhibit No. 11—(Continued)  
tions which may have accrued under said lease dated the 6th day of July, 1917, and said amendments and modifications thereof, prior to the date of such cancellation.

Second: It is agreed that the Mining Company shall have the right, during the term hereof, to work all of the said premises above-described and referred to in mine fashion, and extract and remove therefrom all ores and minerals which may be encountered and which in the Mining Company's opinion it may be desirable or profitable to extract and remove. The Mining Company agrees that it will, during the term hereof, continue in possession of said leased premises and the mine workings therein contained, and that it will maintain and provide such suitable equipment and machinery as may be necessary to operate the same. The Mining Company further agrees to prosecute with reasonable diligence mining operations in [397] and upon said properties or parts thereof, and to that end binds itself to employ underground not less than ten men working each twenty (20) shifts per month during the term hereof. All work done by the Mining Company in said property shall be done in a good, workmanlike, minerlike, and substantial manner.

Third: Before making any division of the net returns of the operation of the property under this lease, or paying any part thereof to the Zinc Company as hereinafter provided, the Mining Company shall be entitled to and shall deduct from such re-

## Plaintiff's Exhibit No. 11—(Continued)

turns all amounts now remaining undeducted and unpaid which the Mining Company has been and is entitled to deduct under the terms and provisions of the agreement of June 1, 1933, between the parties hereto, and the letter agreement between the parties hereto of December 10, 1934, and the said original lease of July 6, 1917, between the parties hereto, and by and all amendments and modifications thereof.

That the amount to be deducted by the Mining Company, as herein provided, has been audited and agreed to as the sum of Three Hundred Fifty-seven Thousand Six Hundred Fifty-six and 77/100 Dollars (\$357,656.77) as of January 1, 1940, and it is understood and agreed that the Mining Company shall be entitled to deduct said amount as adjusted to the date hereof from the net returns of any future operation under this lease before making any division of the net returns as hereinafter provided, or paying any part thereof to the Zinc Company, and shall be entitled to deduct said amount, regardless of the period of time required to provide net returns sufficient to equal such [398] deduction, and that until the net returns of future operations, as hereinafter defined, have been sufficient to provide said amount, the Zinc Company shall not be entitled to any part of the net returns of the operation of the property.

The Mining Company shall be entitled to retain and keep for its own use and benefit fifty per cent. (50%) of the net returns from all ores and minerals

Plaintiff's Exhibit No. 11—(Continued)

mined hereunder, and shall account for and pay to the Zinc Company the remaining fifty per cent. (50%) of said net returns. The Mining Company shall account to the Zinc Company for said fifty per cent. (50%), to be paid to the Zinc Company within fifteen (15) days after receiving settlement from the smelter or reduction works for the ores and minerals shipped. In arriving at the net returns for the purpose of division as herein provided between the Zinc Company and the Mining Company, respectively, all costs and charges of maintaining, preserving and protecting the said property, including all taxes upon the property leased, all costs and charges of mining, milling, smelting, reduction, development, transportation and other charges of every kind whatsoever incurred in connection with the maintenance, operation and mining of the said properties, and the transportation and reduction of the ores obtained therefrom, and the selling of the metals returned or disposed of shall be deducted to reach the net returns to be divided between the parties as herein set forth; provided, that any cross-cut which may be driven from other properties of the Mining Company to develop said premises shall not be considered development [399] work in deducting mining costs until such crosscut or cross-cuts shall have passed through the vertical plane of the north side line of the Emma or Czarromah lode claims.

Fourth: It is understood and agreed that the management of the property hereby leased and the

Plaintiff's Exhibit No. 11—(Continued)

conduct of all mining operations thereon shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; also that the Mining Company shall have the exclusive right to arrange for, enter into and make such contract as it may see fit for the milling and reduction of any and all ores extracted from said premises and the marketing and disposing of the metals obtained therefrom; provided, that the Mining Company will use due diligence to make as favorable contracts in this connection as it may be able to obtain in the general course of the trade.

Fifth: At any time when the Mining Company possesses milling, smelting or other reduction works capable of and suitable for treating the character of ores which may be obtained from the leased premises and undertakes to treat and reduce such ores so obtained, it is agreed that the Mining Company will make a contract with the Zinc Company for the treatment of such ores upon as favorable terms as are made by the Mining Company for the treatment of similar ores of like grade and quantity, treated for any other custom producer. A contract for the smelting and reduction of zinc ores from the said property has been in effect between the parties hereto, as modified from time to time, since the execution of the original lease of July 6, 1917, and it is agreed that a contract [400] for the smelting and reduction of zinc ores for the period covered by this lease has been executed contemporaneously

Plaintiff's Exhibit No. 11—(Continued)  
with the execution hereof, and is hereto attached,  
marked Exhibit "A."

It is understood by the parties hereto that, in addition to the zinc ores in said property, there have been extracted from time to time, and there are now being extracted and marketed, certain high-grade manganese ores; and further, that prior hereto, as evidenced by the agreement between these parties dated the 17th day of May, 1920, an attempt was made to develop the business of making ferro-manganese and thus utilizing low-grade rhodochrosite or carbonate of manganese ores present and to some extent developed in said properties, and further that it was found that the business of making ferro-manganese could not be conducted profitably, and the operation of the said agreement of May 17, 1920 was discontinued, and that said agreement has been and is hereby cancelled and annulled.

It is further understood and agreed that the Mining Company has been experimenting with and perfecting a process at its metallurgical plants for the concentration and reduction of the low-grade manganese ores in said properties, and has developed such process to the point that it seems feasible from an operating standpoint to concentrate and reduce said manganese ores, and to produce a merchantable produce of nodulized manganese ore thereby, and further that the market for such product may be such in the near future or

Plaintiff's Exhibit No. 11—(Continued)

during the term of this lease as to justify the extraction and treatment of the said [401] manganese ores from said mine, but the success of the operation of mining, treating and selling said manganese ores is at present uncertain.

It is understood and agreed that at any time when the Mining Company possesses milling, concentrating or reduction works capable of and suitable for treating the said manganese ores, or any manganese ores which may be obtained from the leased premises, and undertakes to mine, treat, concentrate or reduce such ores so obtained, the Mining Company and the Zinc Company will make, but the Zinc Company shall not be required to make, a contract for the treatment of such ores upon reasonable and fair terms, to be agreed upon between the parties, having due regard to the payment to the Mining Company of the cost of the investment in plant and equipment for the treatment, concentration or reduction of said ores, as well as the operating cost of that operation.

Sixth: All money necessary for the operations herein provided for, including taxes, shall be advanced by the Mining Company, but the Zinc Company shall have no authority to incur any expense, nor will the said Mining Company nor the said operations be liable therefor, unless the same has first been agreed to by the Mining Company, and no salary or other expenses of the Zinc Company shall be charged in any way against the said Mining

Plaintiff's Exhibit No. 11—(Continued)  
Company, or the said operations to be conducted  
under this lease.

Seventh: It is further understood and agreed  
that the said Mining Company may at any time  
abandon and terminate this lease and cease working  
and operating the property covered hereby by  
giving six (6) months' notice in [402] writing to  
the said Zinc Company of its intention so to do,  
and during the said period of six (6) months after  
the giving of such notice, the Mining Company  
shall keep the mine workings in said property free  
from water and upon the termination of said six  
(6) months' period, and upon the turning over of  
the possession of said property by the Mining  
Company to the Zinc Company, all obligations and  
liabilities on the part of the Mining Company, of  
any kind or character hereunder, shall cease and  
terminate, and this lease shall be at an end.

Eighth: It is further understood and agreed  
that if, because of any Act of God, fire, flood, water,  
strike, lock-out, or without limitation by the fore-  
going, any other cause or causes beyond its control,  
the Mining Company shall be prevented from ful-  
filling any term or condition of this lease, such  
failure shall not be considered a breach of the terms  
hereof, and the Mining Company shall not be liable  
in any manner on account thereof, but the Mining  
Company agrees in any such case to use all reason-  
able diligence to remove such preventing cause.

Ninth: It is further understood and agreed that

Plaintiff's Exhibit No. 11—(Continued)  
upon the termination of this lease, either by lapse  
of time, abandonment, or forfeiture, the Mining  
Company will return the peaceful possession of  
said leased premises to the Zinc Company with all  
openings and workings thereon necessary for the  
continued operation of said property in good con-  
dition for such further operation, and that all  
machinery and equipment which shall have been  
permanently installed or attached to the realty or  
mine [403] properties or workings, together with  
one-half ( $\frac{1}{2}$ ) of the tools, supplies and equipment  
which shall not have been affixed to the realty, shall  
become the property of the Zinc Company.

Tenth: It is further understood and agreed that  
the Mining Company shall keep proper books and  
records showing the mining operations conducted  
under this lease, and the proceeds therefrom, and  
that the Zinc Company shall have the right, through  
its duly designated officers, representatives, or  
agents, to examine all accounts of the Mining Com-  
pany kept in connection with the performance of  
the work hereunder, and the making of settlements  
for the ores and products of the property, and that  
the Zinc Company, its officers, representatives or  
agents, shall at all reasonable times have access to  
and egress from all of the premises of the Zinc  
Company in the control of the Mining Company  
hereunder, together with a right to make full in-  
spection and survey of the same, and to obtain at  
reasonable periods from the Mining Company copies

Plaintiff's Exhibit No. 11—(Continued)  
of working maps showing mining operations conducted in said properties.

Except as hereinafter provided, the Mining Company assumes as between the parties hereto the responsibility for all claims which may arise in favor of any individual, firm or corporation for any tort arising out of the operation of the leased premises during the period that such premises are in possession of the Mining Company, or any contract obligations incurred by the Mining Company while controlling said premises, and the Mining Company agrees to indemnify and keep indemnified the Zinc Company, its [404] successors and assigns, against any and all such claims, and at its own cost and expense to defend against such claims and pay the cost of such defense, and any judgment recovered on such claims; provided, however, that the Mining Company shall not be under any obligation or duty, nor shall it have any liability whatsoever in connection with any claim which may be asserted by any person or corporation of ownership to any of the premises leased hereby, or any ores, or minerals in ore, mined or removed therefrom, or for trespass upon any of the premises above described, this lease being entered into upon the understanding and the basis that the Zinc Company is the owner of the premises and the ore bodies hereinabove described and referred to.

Eleventh: This lease is and shall be binding upon and inure to the benefit of the parties hereto, their respective successors and assigns.

Plaintiff's Exhibit No. 11—(Continued)

In Witness Whereof, the parties have caused these presents to be executed, and their corporate seals affixed, by their respective officers thereunto duly authorized, the day and year first above written.

[C. S.]            BUTTE COPPER AND ZINC  
                      COMPANY,  
By /s/ ALPHONSE A. SHELARE,  
                      Its President.

Attest.

/s/ MILES S. McDONALD,  
                      Its Secretary.

[C. S.]            ANACONDA COPPER  
                      MINING COMPANY,  
By /s/ J. R. HOBBINS,  
                      President.

Attest:

/s/ K. B. FRAZER,  
                      Its Ass't Secretary. [405]

State of New York,  
County of New York—ss.

On this 5th day of July, A. D. 1940, before me, Edward Perpeet Jr., a Notary Public in and for said county and state, personally appeared Alphonse A. Shelare, known to me to be the President of the Butte Copper & Zinc Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written. (N. S.)  
(N. S.)      /s/ EDWARD PERPEET JR.  
Notary Public for the State of New York, Residing at 190 Woodland Ave., White Plains, N. Y.  
My Commission expires 1941.

EDWARD PERPEET JR.

Notary Public Westchester Co. Certificate Filed in N. Y. Co. No. 569, New York Register's No. 1-P-340. Commission expires March 30, 1941.

State of New York,  
County of New York—ss.

On this 8th day of July, A. D. 1940, before me, Walter G. Martin, a Notary Public in and for the said county and state, personally appearel J. R. Hobbins, known to me to be president of Anaconda Copper Mining Company, the corporation that executed the within instrument, and acknowledge to me that such corporation [406] executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year in this certificate first above written.

(N. S.)      /s/ WALTER G. MARTIN,  
Notary Public for the State of..... Residing at..... My Commission expires.....  
Notary Public, Nassau County No. 1057. Certificate Filed in N. Y. County. County Clerk's No. 38, Reg. No. 2-M-14. My Commission expires March 30, 1942.

Filed: April 7, 1947. H. H. Walker, Clerk.

## CERTIFICATE

I, Joseph V. Flaherty, hereby certify that I am a stenographic court reporter by profession and occupation; that on March 31, 1947, the Honorable R. Lewis Brown, Judge of the District Court of the United States for the District of Montana, Butte Division, made an order of record appointing me official court reporter for the trial of Cause No. 176, Poague versus Butte Copper and Zinc Company; that I reported in shorthand the testimony of the witnesses and the proceedings of the court during the trial of said cause, and that the above and foregoing is a true and correct transcription of such testimony and proceedings to the best of my skill and ability.

/s/ JOSEPH V. FLAHERTY.

Filed May 2, 1947. H. H. Walker, Clerk.

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CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

United States of America,  
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing two volumes consisting of 422 pages, numbered consecutively from 1 to 422, inclusive, is a full, true and correct transcript of

all matter designated by the parties and required by rule as the record on appeal in case No. 176, Mrs. Nellie Allen Poague, Plaintiff, vs. Butte Copper and Zinc Company, a corporation, Defendant, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that pursuant to the order of said District Court, I transmit herewith as a part of the record on appeal, original plaintiff's Exhibits 1, 12, 13, 14, 15, 17, 18, 19, 20-a, 20-b, 21, 22, 23, 24, 25, 26 and 27 and defendant's Exhibits 4 and 28, all of which said exhibits were received in evidence at the trial of said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-Nine and 30/100 Dollars (\$39.30), and have been paid by the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 13th day of May, A.D. 1947.

[Seal]

H. H. WALKER,  
Clerk.

/s/ By D. F. HOLLAND,  
Deputy Clerk. [422]

[Endorsed]: No. 11633. United States Circuit Court of Appeals for the Ninth Circuit. Butte Copper and Zinc Company, a corporation, Appellant, vs. Mrs. Nellie Allen Poague, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 20, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11633

BUTTE COPPER AND ZINC COMPANY, a cor-  
poration,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE, formerly  
NELLIE ALLEN,

Appellee.

STATEMENT OF POINTS ON APPEAL AND  
DESIGNATION OF CONTENTS OF REC-  
ORD ON APPEAL, SUBDIVISION 6 OF  
RULE 19 (C.C.A.)

STATEMENT OF POINTS ON APPEAL

Appellant and defendant, Butte Copper and Zinc Company, a corporation, hereby specifies the following points upon which it intends to rely on the appeal in the above entitled matter:

## I.

The Court committed error in refusing to grant defendant-appellant's motion for a directed verdict (tr. p. 323) because:

1. There was and is no evidence to support a verdict in favor of plaintiff-appellee and against the defendant-appellant.
2. There was and is no evidence to support a judgment in favor of plaintiff-appellee and against defendant-appellant.
3. There was and is no evidence that defendant-appellant performed any act or acts that could or did cause any damage to plaintiff-appellee's property.
4. The evidence was and is conclusive that defendant-appellant did not perform any act or acts that could or did cause any damage to plaintiff-appellee's property.
5. There was and is no evidence that defendant-appellant performed any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff-appellee's property.
6. The evidence was and is conclusive that the defendant-appellant did not perform any act or acts by or through an agent, servant or partner that could or did cause any damage to plaintiff-appellee's property.
7. The evidence was and is conclusive that defendant-appellant was a Lessor of the prop-

erty in which the mining alleged to have damaged the property of the plaintiff-appellee was performed; and that any mining performed was performed by a Lessee and was not under the control or supervision of defendant-appellant.

## II.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 2 (tr. pp. 327-328; 355) for each of the reasons set forth in Paragraph I above.

## III.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 3 (tr. pp. 327-328; 355-356) for each of the reasons set forth in Paragraph I above.

## IV.

That the Court committed error in giving plaintiff-appellee's Instruction numbered 5 (tr. pp. 325, 356) because:

1. Of each of the reasons set forth in Paragraph I above.
2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

**V.**

That the Court committed error in giving plaintiff-appellee's Instruction numbered 9 (tr. pp. 325; 361-363) because:

1. Of each of the reasons set forth in Paragraph I above.
2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

**VI.**

That the Court committed error in giving plaintiff-appellee's Instruction numbered 11 (tr. pp. 326, 364) because:

1. Of each of the reasons set forth in Paragraph I above.
2. Said Instruction permitted the jury to find that defendant-appellant mined beneath the surface of plaintiff-appellee's property and damaged the same, when the evidence was and is conclusive and uncontradicted that the defendant-appellant did no mining, either by itself or through an agent, servant or partner.

**VII.**

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 1

(tr. pp. 327-355) for each of the reasons set forth in Paragraph I above.

### VIII.

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 12 (tr. pp. 328-329; 357) for each of the reasons set forth in Paragraph I above.

### IX.

That the Court committed error in refusing to give defendant-appellant's Instruction numbered 13 (tr. pp. 329, 357) for each of the reasons set forth in Paragraph I above.

### X.

That the Court committed error in giving that portion of its charge to the jury set forth as follows:

"If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or

withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.” (tr. pp. 331-333; 342-343).

for each of the reasons set forth in Paragraph I above.

## XI.

That the Court committed error in admitting the evidence of leaks, repairs or changes in gas mains or pipes (tr. pp. 82-94) and evidence of gas explosions (tr. pp. 207-209) over defendant-appellant's objections, and in refusing to grant defendant-appellant's motion to strike such evidence (tr. pp. 306-310) because:

1. There was and is no evidence that proved or tended to prove that said leaks, repairs or changes or gas explosions were due to or caused by any act or acts of defendant-appellant, its agent, servant or partner.
2. There was and is no evidence tending to show or prove that any such leaks, repairs or changes in gas lines or pipes or gas explosions were competent, relevant or material, or that they tended to prove or disprove any issue in

this case or that plaintiff-appellee sustained any damages thereby.

3. No cause was ascribed for the leaks, repairs or changes or explosions and no evidence was or is given upon which a conclusion as to the causes of such leaks or explosions could properly be predicated, and that the jury was permitted to speculate as to the reasons for and causes of said leaks, repairs or changes in gas lines and pipes and the reasons for or causes of said gas explosions.

### XII.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 2 (tr. pp. 327-328; 355) for each of the reasons set forth in Paragraph XI above.

### XIII.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 3 (tr. pp. 328; 355-356) for each of the reasons set forth in Paragraph XI above.

### XIV.

That the Court committed error in refusing defendant's-appellant's motion to strike the testimony of plaintiff-appellee Poague respecting leaks in the plumbing of her house (tr. pp. 306-310) and in refusing to grant defendant-appellant's requested Instruction numbered 14 (tr. pp. 329-330; 358) because:

1. There was and is no evidence that said leaks were caused by ground movement due to mining.
2. There was and is no evidence tending to show or prove that facts regarding any such leaks were competent, relevant or material or that they tended to prove or disprove any issue in this case.
3. No cause was ascribed for the leaks and no evidence was or is given upon which a conclusion as to the cause of such leaks could be properly predicated.

#### XV.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 15 (tr. pp. 330, 358) because:

1. For each of the reasons set forth in Paragraph I above.
2. There was and is no evidence that the razing of the buildings was necessary.
3. The evidence conclusively shows that the razing of plaintiff-appellee's buildings was not necessary to protect pedestrians using the sidewalks as alleged in the complaint.
4. The allegation of the complaint that razing of the buildings was necessary to protect pedestrians on the sidewalks in front of said buildings and that the cost thereof was a necessary element of damages was wholly unsupported by the evidence and should not have been left for the consideration of the jury.

## XVI.

That the Court committed error in refusing to give defendant-appellant's requested Instruction numbered 16 (tr. pp. 330-331; 358) because:

1. The law does not make a Lessor of mining ground liable for damage because of failure to include a covenant or agreement in its lease to the effect that the Lessee will support the surface of the ground.

#### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Butte Copper and Zinc Company, a corporation, hereby designates under Subdivision 6 of Rule 19 (C.C.A.) the following portions of the certified typewritten Transcript of Record in the above entitled cause on file herein to be contained in the printed record on the appeal of said appellant:

1. Title of Court and Cause (tr. p. 1).
2. Names and addresses of attorneys of record (tr. p. 2).
3. Plaintiff's Amended Complaint (tr. pp. 4-8).
4. Answer of Butte Copper and Zinc Company, defendant (tr. pp. 10-13).
5. Minute Entry denying and overruling the First Defense in defendant's Answer (tr. p. 15).
6. Reporter's Transcript of testimony (tr. pp. 27-408).

7. That portion of the Minute Entry dated April 3, 1947, contained in Paragraph 7 thereof, setting forth the Order denying defendant's motion for a directed verdict (tr. p. 17).
8. Verdict (tr. p. 19).
9. Judgment (tr. pp. 21, 22).
10. Notice of Appeal (tr. p. 24).
11. Order for Transmission of Original Exhibits (tr. p. 410).
12. Order Amending Order for Transmission of Original Exhibits (tr. p. 410-B).
13. Designation of Contents of Record on Appeal and Statement of Points Upon Which Defendant Intends to Rely (tr. pp. 412-418).
14. Certificate of Clerk of Court (tr. p. 422).
15. Statement of Points Upon Which Defendant Intends to Rely and Designation of Portions of the Record to be Printed Under Rule 19 (C.C.A.).

Dated this 15th day of May, 1947.

/s/ W. H. HOOVER,  
/s/ R. H. GLOVER,  
/s/ JOHN V. DWYER,  
/s/ J. T. FINLEN, JR.,  
/s/ SAM STEPHENSON, JR.,

Attorneys for Defendant and  
Appellant.

Service of the foregoing Statement of Points on Appeal and Designation of Contents of Record on Appeal, Subdivision 6 of Rule 19 (C.C.A.) acknowledged, and copy thereof received, this 15th day of May, 1947.

/s/ EARL N. GENZBERGER,

/s/ H. L. MAURY,

/s/ A. G. SHONE,

Attorneys for Plaintiff and  
Appellee.

[Endorsed]: Filed May 20, 1947.